

# THE RE-STATE-MENT OF NON-STATE LAW: THE STATE, CHOICE OF LAW, AND THE CHALLENGE FROM GLOBAL LEGAL PLURALISM

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## I. INTRODUCTION

Should choice of law norms ever designate non-state norms as applicable law? The question is not new, of course, although it is seldom discussed systematically. Twenty-five years ago, Perry Dane proposed conceptualizing the relationship between the state and the church as a conflict of laws instrument to deal with conflicts between law and religion.<sup>1</sup> We might like to apply a similar analysis to conflicts between law and culture, visible for example in the debate about a “cultural defense.”<sup>2</sup> But to do so, we would need a general theory; and such a theory is lacking. Textbooks in the United States and in the United Kingdom usually define conflict of laws as the field dealing with situations that have contacts with more than one *state*. Choice of law is the choice of which *state’s* law applies; non-state law is not discussed.<sup>3</sup> In Europe, particularly in Germany, some debate the applicability of a specific body of non-state norms, the new *lex mercatoria*;<sup>4</sup> but usually no general discussion of non-state norms ensues. Individual proposals rarely lead to general discussions. Choice of law as a discipline has largely defined itself as choice between laws of states. As a discipline, it considers issues regarding the applicability of non-state normative orders as peripheral at best.

Yet the question of whether non-state norms can be the applicable law

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1. Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 365-76 (1980); see Gregory A. Kalscheur, *John Paul II, John Courtney Murray, and the Relationship Between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, 1 J.CATH.SOC.THUGHT 231 (2004). For a recent analysis of the relationship from a position of religious pluralism, see Steven D. Smith, *The Pluralist Predicament: Contemporary Theorizing in the Law of Religious Freedom*, 10 LEGAL THEORY 51 (2004). Notably, the normative pluralism these author invoke excludes the state itself. The state can be neutral vis-à-vis the divergent religions precisely because it stands above all of them. This approach, of course, was the goal of attack in Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26 (Robert Tucker ed., 2d ed. 1978).

2. ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* (2004); LEON SHELEFF, *THE FUTURE OF TRADITION: CUSTOMARY LAW, COMMON LAW, AND LEGAL PLURALISM* 262-85 (2000).

3. *E.g.*, EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 1 (4th ed. 2004) [hereinafter SCOLES]; I DICEY AND MORRIS ON THE CONFLICT OF LAWS 3, 26-27 (Lawrence Collins et al. eds., 13th ed. 2000).

4. *E.g.* CHRISTIAN VON BAR & PETER MANKOWSKI, I INTERNATIONALES PRIVATRECHT 76-88 (2d ed. 2003); GERHARD KEGEL & KLAUS SCHURIG, INTERNATIONALES PRIVATRECHT 127-28 (9th ed. 2004).

moves from the periphery to the center once we view conflict of laws through the lens of globalization. Globalization reminds us that the state is constrained not only by other states and supranational organizations but also by non-state organizations (e.g. NGOs), communities (e.g. religious groups), and powerful private players (e.g. multinational corporations). All these actors, in one way or other, play roles in the globalizing world that were traditionally reserved to the state. One of these roles might be the role of lawmaker. This idea is articulated in the theory of global legal pluralism, which posits the existence of a plurality of legal orders created both by states and by non-state communities.

If, through the lens of globalization, states and non-state communities both create norms, this must pose a challenge to conflict of law rules that traditionally only designate state norms as applicable law. Somewhat surprisingly, far so few have analyzed the confluence of conflict of laws and global legal pluralism in depth.<sup>5</sup> Authors on global legal pluralism, insofar as they ever address the interactions between different legal orders, often use concepts like interlegality. Boaventura de Sousa Santos, who framed the term,<sup>6</sup> defines interlegality as “the impact of legal plurality on the legal experiences, perception and consciousness of the individuals and social groups living under conditions of legal plurality, above all the fact that their everyday life crosses or is interpenetrated by different and often contrasting legal orders and legal cultures.”<sup>7</sup> For choice of law, this “phenomenological counterpart of legal plurality”<sup>8</sup> is hard to operationalize.<sup>9</sup> Yet, arguably,

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5. E.g., Jürgen Basedow, *The Effects of Globalization on Private International Law*, in LEGAL ASPECTS OF GLOBALIZATION: CONFLICT OF LAWS, INTERNET, CAPITAL MARKETS AND INSOLVENCY IN A GLOBAL MARKET 1, 6 (Jürgen Basedow & Toshiyuki Kono eds., 2000); Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005) [hereinafter Berman, *Cosmopolitan Vision*]; Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005) [hereinafter Berman, *Law and Globalization*]; Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002) [hereinafter Berman, *Globalization of Jurisdiction*]; Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004).

6. Boaventura de Sousa Santos, *Law: A Map of Misreading. Towards a Postmodern Conception of Law*, 14 J.L. & SOC'Y 279, 288, 298 (1987).

7. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE 97 (2d ed. 2002)]. For a sympathetic comment, see WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY 229-31 (2002).

8. Santos, *supra* note 6, at 298; SANTOS, *supra* note 7, at 437.

9. But see Marc Amstutz, *In-Between Worlds—Marleasing and the Emergence of Interlegality in Legal Reasoning*, 11 EUR. L.J. 766 (2005) (attempting to combine choice of law and interlegality for the relationship between the law of the European Union and the laws of its member states); see also Fischer-Lescano & Teubner, *supra* note 5, at 1007-08.

choice of law requires a specific legal way of dealing with legal plurality. We might hope to find such a way in the writings of conflict of laws scholars. Yet these scholars usually deal with non-state normative orders (if at all) without an underlying theory. They typically reject the applicability of non-state normative orders with the argument that such orders can derive their authority only from the state, without questioning why this should be so.

Prima facie, this lack of interaction seems surprising. One would think both fields could benefit from the encounter. Global legal pluralism would find an ideal testing ground for the otherwise academic question of whether non-state normative orders can be recognized as “law.” Conflict of laws would find an entrance into the world of globalization which, strangely, has otherwise not had great influence on the field. However, the lack of interest of each discipline in the other may reflect the fact that the questions they ask are different, that their tools and instruments are different, and that the accurate translation of the findings from one discipline to the other is not possible. Of course, this is all the more reason to analyze these relations. Indeed, such analyses are starting to emerge.

One of those who first opened our eyes to the potential impact of legal pluralism on conflict of laws is Paul Berman. While Berman has so far explicitly left the elaboration of this impact to a later article,<sup>10</sup> his work on conflict of laws<sup>11</sup> and on law and globalization<sup>12</sup> already suggests a possible relation between pluralism and conflict of laws. Berman argues that lawmaking is not a matter of state power but of community definition; lawmaking power is not confined to states but can be claimed by all kinds of communities.<sup>13</sup> The law of these communities can become applicable by others if the communities succeed in what Berman calls jurispersuasion—convincing others of one’s legitimate lawmaking power.<sup>14</sup> States, too, should acknowledge this lawmaking power of non-state communities.<sup>15</sup> This seems to imply, though Berman himself does not say so explicitly, that such acknowledgement should take place through choice of law rules. In this way, the normative orders of non-state communities can become applicable law.

Another author who has dealt with the relationship between global legal

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10. Berman, *Cosmopolitan Vision*, *supra* note 5, at 1821.

11. *Id.* at 1863-64.

12. Berman, *Law and Globalization*, *supra* note 5, at 507-11, 538-40.

13. *Id.* at 507-11.

14. *Id.* at 538-40. For his explication of the term jurispersuasion, see *id.* at 533-38. See also Berman, *Globalization of Jurisdiction*, *supra* note 5, at 502.

15. *E.g.*, Berman, *Law and Globalization*, *supra* note 5, at 540.

pluralism and conflict of laws both alone<sup>16</sup> and in a recent article co-authored with Andreas Fischer-Lescano<sup>17</sup> is Gunther Teubner. Although Teubner's approach to legal pluralism<sup>18</sup> is in many respects very different from Berman's,<sup>19</sup> some elements are quite similar. Like Berman, Teubner argues that lawmaking in globalization is no longer (if it ever was) a monopoly of the state.<sup>20</sup> Law is created mainly by non-state communities in the peripheries, not by invoking an authority, but by using the code of legal/illegal. This finding has practical implications, as Teubner makes clear in the example of the new law merchant, or *lex mercatoria*: "The debate on *lex mercatoria* is one of the rare cases in which practical legal decision-making becomes directly dependent upon legal theory."<sup>21</sup> Although Teubner moderates the point somewhat,<sup>22</sup> he still seems to imply that, *prima facie*, states should be ready to apply non-state normative orders through their conflict of laws system because legal theory demonstrates that they are law. Likewise, Fischer-Lescano and Teubner argue for a choice of law concept "that is not based on the determination of one territorial law which has the closest relation to the conflict, but which seeks instead to identify the functional regime to which the legal issue in question belongs."<sup>23</sup> In other words, a finding of legal theory and legal sociology—law in the world moves from segmentary differentiation between states to functional differentiation between regimes<sup>24</sup>—has implications on legal practice, it forces the state to adapt its choice of law regime.

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16. Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443 (1992) [hereinafter Teubner, *The Two Faces of Janus*].

17. Fischer-Lescano & Teubner, *supra* note 5.

18. See Teubner, *The Two Faces of Janus*, *supra* note 16, at 1451; Gunther Teubner, *Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors?*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 71 (Karl-Heinz Ladeur ed., 2004) [hereinafter Teubner, *Global Private Regimes*]; Gunther Teubner, "Global Bukowina": *Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997) [hereinafter Teubner, *Global Bukowina*]; Gunther Teubner, *Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter*, in PARADOXES AND INCONSISTENCIES IN THE LAW 41 (Oren Perez & Gunther Teubner eds., 2005).

19. In fact, Teubner and Fischer-Lescano criticize Berman of "cultural reductionism." See Fischer-Lescano & Teubner, *supra*, note 5, at 1004 n.18.

20. Teubner, *Global Bukowina*, *supra* note 18, at 3-4.

21. *Id.* at 9; see Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 AM. J. COMP. L. 149, 150 (1997) [hereinafter Teubner, *Breaking Frames*].

22. Teubner, *Global Bukowina*, *supra* note 18, at 11 ("Of course, legal theory cannot 'bind' legal practices of *lex mercatoria* in their determination of what is legal and what is not.").

23. Fischer-Lescano & Teubner, *supra* note 5, at 1021.

24. NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 573 (1995).

This paper uses these approaches as starting point. It is not a critique the work of Berman or of Teubner on the relationship between pluralism and conflict of laws. Berman has left elaboration to a future article,<sup>25</sup> and Teubner has not developed a full theory of conflict of laws,<sup>26</sup> so any such critique would first have to construct its object before critiquing its own construction. Neither does this paper set out its own theory of conflict of laws for global legal pluralism. Instead, my goal is more modest: to attain conceptual clarity about the encounter of pluralism and conflict of laws that would make such a theory possible.

To this end, I examine four issues. Part II examines what global legal pluralism is and to what extent the normative orders created by non-state communities can be considered "law" from a theoretical standpoint. Part III is devoted to the question of how state law, including conflict of laws, currently deals with non-state normative order. I will show that traditional conflict of laws rejects the applicability of non-state law. However, this rejection of non-state law by traditional conflict of laws doctrine must be understood in combination with the other methods the state uses to account for non-state normative orders, which I call "incorporation," "deference," and "delegation." The combination shows that the state does acknowledge non-state normative orders, only it does not acknowledge them as law. This leads to the third issue, dealt with in Part IV: Why does the state acknowledge the laws of foreign states as law while denying this status to non-state normative orders? The reason is that the state would otherwise undermine its own authoritative position. Treating non-state law as law weakens its position, while treating the law of foreign states as law actually strengthens it. Of course, such weakening of the state need not be a bad thing. In Part V, the fourth issue, therefore, is what a more inclusive approach to conflict of laws, recognizing non-state normative orders as law, would require and imply. This fourth issue cannot be examined in full here, but I will try to show that such a reconceptualization of the state would be more far-reaching, and potentially less attractive, than proponents of legal pluralism might wish. I conclude in Part VI with a cautionary note: the relation between global legal pluralism and conflict of laws is more complex and may necessitate more radical rethinking of traditional ideas

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25. Amstutz, *supra* note 9.

26. He has, however, previously used conflict of laws methodology as inspiration for conflict between different communications. See Fischer-Lescano & Teubner, *supra* note 5; see also GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM 100-22 (Anne Bankowska & Ruth Adler trans., Zenon Bankowski ed., 1993); Gunther Teubner, *De Collisione Discursuum: Communicative Rationalities in Law, Morality, and Politics*, 17 CARDOZO L. REV. 901 (1996) [hereinafter Teubner, *De Collisione Discursuum*].

than one might otherwise think.

## II. UNCOUPLING LAW FROM THE STATE: NON-STATE NORMATIVE ORDERS AND GLOBAL LEGAL PLURALISM

Although law predates the rise of the state by centuries,<sup>27</sup> we have, since the rise of the nation state, come to equate law with state law.<sup>28</sup> If globalization is largely about overcoming the monopolistic position of the state,<sup>29</sup> then it should also be about overcoming its monopolistic position in the creation, adjudication, and enforcement of law. This is the postulate of global legal pluralism.

### A. Examples of Non-State Normative Orders

In a world that knows actors other than states, we should expect to find laws other than state laws. The two examples most prominent in the debate on globalization are the alleged autonomous law of the Internet and the so-called new *lex mercatoria*. We should therefore start our analysis here.

#### 1. The Autonomous Law of the Internet

Does the Internet have, or even constitute, its own legal order? This was the topic of the well-known debate in the 1990s between David Johnson and David Post and Jack Goldsmith about conflict of laws in the Internet.<sup>30</sup> That debate had two related levels, one conceptual and one normative. Conceptually, Johnson and Post argued that the Internet had its own space<sup>31</sup>

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27. HAROLD J. BERMAN, *LAW AND REVOLUTION* 49-83 (1983).

28. Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323, 326 (1993). For the history of the relation between state and law, see SANTOS, *COMMON SENSE*, *supra* note 7, at 21-84; David B. Goldman, *Historical Aspects of Globalization and Law*, in *JURISPRUDENCE FOR AN INTERCONNECTED GLOBE* 43 (Catherine Dauvergne ed., 2003).

29. Of course, the role of the state in globalization is more complex and controversial. For an overview of positions, see DAVID HELD & ANTHONY MCGREW, *THE GLOBAL TRANSFORMATIONS READER* 105-81 (2d ed. 2003).

30. For a summary and analysis of the debate, see Berman, *Globalization of Jurisdiction*, *supra* note 5, at 371-77, 406-11.

31. David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1378-89 (1996); see LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 190 (1999).

that gave it its own territorial sovereignty<sup>32</sup> with its own legal order.<sup>33</sup> This led them to the normative argument that states should apply, or at least not interfere with, the autonomous law of the Internet. Goldsmith challenged both claims. On the conceptual level, he rejected the idea of cyberspace as its own space outside real space with its own legal order.<sup>34</sup> Even if transactions took place through the Internet, he argued, their relevant effects happened to real people, in real locations, under the sovereign power of real states.<sup>35</sup> Normatively, Goldsmith saw no need to change the principles of conflict of laws because he considered online transactions to be functionally identical to offline transactions.<sup>36</sup> In a rejoinder, Post made a more modest claim than before. Instead of reiterating the theme of the Internet as a virtual territory with its own law, he now emphasized that, because technological change had brought about changes in conflict of laws at earlier times of technological progress, the new technology of the Internet should bring about a similar change in approach now.<sup>37</sup>

Not all details of the debate are relevant for the purposes of this essay. Arguably, Johnson and Post overestimated, while Goldsmith underestimated, the novel character of the Internet.<sup>38</sup> What matters here is

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32. See LESSIG, *supra* note 31, at 198. ("To the extent that architectures in cyberspace are rules that affect behavior, the space is sovereign.")

33. David G. Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155, 167 (1996); Johnson & Post, *supra* note 31, at 1380-87; see David R. Johnson et al., *The Accountable Internet: Peer Production of Internet Governance*, 9 VA. J. L. & TECH. 1 (2004). For an analysis of self-regulation on the Internet, see MONROE E. PRICE & STEFAAN G. VERHULST, *SELF-REGULATION AND THE INTERNET* (2005). For a number of mostly libertarian articles on Internet self-governance, see WHO RULES THE NET? INTERNET GOVERNANCE AND JURISDICTION (Adam Thierer & Clyde W. Crews Jr. eds., 2003). Cf. Berman, *Globalization of Jurisdiction*, *supra* note 5, at 409.

34. Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1239-40, 1250 (1998).

35. *Id.* at 1239-40; see Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL L. STUD. 475, 479 (1998). A dramatic example was recently reported from China, in an internet role game. A man had been defrauded, in an internet role game, of a virtual weapon. After the police were unwilling to help him, he took the matter into his own hands, found out the real person behind the virtual character that had taken his weapon, and killed him. See Jonathan Watts, *Harsh Reality of China's Fantasy Craze: Online Games Blamed for Thefts, Suicides and Murders*, THE GUARDIAN, Mar. 31, 2005, at 15.

36. Goldsmith, *supra* note 34, at 1233-36. For a similar argument, see Peter Mankowski, *Das Internet im Internationalen Vertrags- und Deliktsrecht*, 63 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 203 (1999).

37. David G. Post, *Against "Against Cyberanarchy,"* 17 BERKELEY TECH. L. J. 1365 (2002); see Berman, *Globalization of Jurisdiction*, *supra* note 5, at 409.

38. See, e.g., LESSIG, *supra* note 31, at 193. However, Lessig himself seems to



a point Post raises regarding whether or not Internet transactions are “functionally identical” to offline transactions: “it depends entirely on the question you are asking.”<sup>39</sup>

To the extent that our question requires us to ask whether “real people in one territorial jurisdiction [are] transacting with [other] real people in other territorial jurisdictions,” cyberspace and realspace transactions are, for that purpose, identical. To the extent that our question requires us to ask something else—whether, say, they involve bits and software, or instantaneous communication with enormous numbers of people across the global network, etc.—they are not.<sup>40</sup>

This shifts the question from a conceptual or even an ontological one—how different is the internet in reality from traditional space, to what extent is it in reality its own space—to a normative one—which factors are relevant for our specific purposes. In order to determine jurisdiction and applicable law, is the relevant factor the place of conduct and effects within countries? Then, indeed, the Internet does not need any new rules; and its own rules are not extraterritorial laws.<sup>41</sup> Or is the crucial fact that the Internet adds a tremendous amount of complexity, that territorial connections are irrelevant, as Post holds?<sup>42</sup> If so, then, maybe the Internet really requires new rules or a new approach. Of course, by rephrasing the issue like this, it becomes clear that the state is not in any way forced to recognize the internal order of the Internet as law or to deny it that status. Rather, the question has become one of choice. As Richard Ford has put it, “[i]f the Internet becomes cyberspace, it will be because we made it so.”<sup>43</sup>

Whether the Internet has its own legal order depends on whether we recognize it as one. Is this recognition in the sense of conflict of laws? Is it an acknowledgment that the normative order of the Internet can be the applicable law in a choice of law process, that “decisions” of the Internet should be enforced by state courts? Although they do not say so explicitly, Johnson and Post argue in this direction when they ask the state to grant comity to the normative order of the Internet.<sup>44</sup> Comity becomes for them

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overemphasize the novelty of the Internet with regard to conflicts of laws. *Id.* at 192-94.

39. Post, *supra* note 37, at 1374.

40. *Id.* at 1376 (internal quote omitted).

41. Goldsmith, *supra* note 34.

42. Post, *supra* note 37, at 1376-81.

43. Richard Ford, *Against Cyberspace*, in *THE PLACE OF LAW* 147, 151 (Austin Sarat et al., eds., 2003).

44. See Johnson & Post, *supra* note 31, at 1391-95. The authors combine comity with

a (somewhat crude) conflict of laws norm based on (non-)governmental interests and regulatory advantage,<sup>45</sup> mandating that “those who care more deeply about and better understand the disputed activity should determine the outcome.”<sup>46</sup> It is telling that although Goldsmith focuses much more explicitly on conflict of laws, he considers only conflicts between state laws and does not even address the implied claim that conflict of laws between state law and Internet law is possible.<sup>47</sup> Whether a conflict of laws problem exists or not becomes a matter of perspective.

## 2. *The New Lex Mercatoria*

Another alleged body of non-state law is the so-called “new lex mercatoria.”<sup>48</sup> Law merchant, or *lex mercatoria*, actually refers to at least two historically distinct ideas of laws: the medieval *lex mercatoria* and the “new lex mercatoria.”<sup>49</sup> As the theory goes, the old *lex mercatoria* was the non-national law of international commerce—created not by the authority of states but rather by and within international commerce itself. This non-state law was recognized not only in several treatises<sup>50</sup> but also in decisions

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delegation, although both are analytically different instruments. For my own concept of delegation, see *infra* Part III. D.

45. Comity is still frequently considered the basis for conflict of laws in U.S. conflict of laws. For the history of the concept, see ALAN WATSON, *A COMITY OF ERRORS* (1992).

46. Johnson & Post, *supra* note 31, at 1392. The first prong of their test (“care more deeply”) sounds like a comparative impairment test, and the second one (“better understand”) sounds like a test of regulatory advantage. For comparative impairment as a choice of law test, see William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963). For regulatory advantage, see RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 602-03 (6th ed. 2002). Later, Johnson & Post develop a public policy exception of the Internet against state regulation, based on its fundamental policy of free speech. Johnson & Post, *supra* note 31, at 1394-95. It is not clear on what grounds such a policy exception by the internet should be binding for the state.

47. See Goldsmith, *supra* note 34.

48. Internet law has frequently been linked to *lex mercatoria*. For two early occurrences, see Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. PITT. L. REV. 993, 1019-21 (1994) and Raj Bhala, *Self-Regulation in Global Electronic Markets Through Reinigorated Trade Usages*, 31 IDAHO L. REV. 863, 902-05 (1995). See also Johnson & Post, *supra* note 31, at 1389; Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 U. TORONTO L.J. 265 (2003).

49. An excellent history and historiography of old and new *lex mercatoria* is Nikitas Hatzimihail, *The Many Lives—and Faces—of Lex Mercatoria: An Essay on the Genealogy of International Business Law* (on file with author); see Nicholas H. D. Foster, *Foundation Myth as Legal Formant: The Medieval Law Merchant and the New Lex Mercatoria* (Mar. 18, 2005), available at <http://www.forhistiur.de/zitat/0503foster.htm> (Last visited Oct. 30, 2005)].

50. See, e.g., *LEX MERCATORIA AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY*

by judges of the state.<sup>51</sup> For example, Gerard Malynes explained lex mercatoria in 1622 as “customary law approved by the authority of all kingdoms and not as law established by the sovereignty of any prince.”<sup>52</sup> In a 1765 decision that Justice Story would later cite with approval in *Swift v. Tyson*,<sup>53</sup> Lord Mansfield explained that “[t]he law of merchants, and the law of the land, is the same: a witness can not be admitted, to prove the law of merchants. We must consider it as a point of law.”<sup>54</sup> This old body of non-state law has been invoked in attempts to revitalize the idea since the middle of the twentieth century.<sup>55</sup> In France, Berthold Goldman developed a concept of lex mercatoria as a legal order that developed on the basis of party autonomy claimed by merchants in a private, spontaneous way.<sup>56</sup> In England, Clive Schmitthoff saw a convergence of national trade laws and non-state trade practices, including standard terms, developing into a new transnational lex mercatoria.<sup>57</sup> In Germany, Klaus Peter Berger has more recently developed a system of “creeping codification of the lex mercatoria.”<sup>58</sup> Like the old lex mercatoria, the new lex mercatoria is said to be an autonomous non-state legal order with special rules and special adjudicating bodies—in particular, arbitral panels.<sup>59</sup> Like the old lex mercatoria, the new lex mercatoria should be acknowledged and applied by the courts of the state.<sup>60</sup>

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TREATISE AND ITS AFTERLIFE (Mary Elizabeth Basile et al. eds. & trans., 1998); GERARD MALYNES, *LEX MERCATORIA, THE ANCIENT LAW-MERCHANT* 3 (Katie F. Hamilton ed., 2d ed. 2001) (1622); WYNDHAM BEAWES, *LEX MERCATORIA REDIVIVA, OR THE MERCHANT'S DIRECTORY, BEING A COMPLETE GUIDE TO ALL MEN IN BUSINESS* (4th ed. 1783).

51. See, e.g., *Pillans v. Van Mierop*, (1765) 97 Eng. Rep. 1035 (K. B.).

52. MALYNES, *supra* note 50, i-3 to i-4. Modern analysts tend to disregard the requirement of approval by the sovereign.

53. 41 U.S. 1, 20 (1842).

54. *Pillans*, 97 Eng. Rep. at 1038. Cf. *id.* at 1041 (Aston, J., dissenting) (“If there be such a custom of merchants as has been alledged [sic], it may be found by a jury: but it is the Court, not the jury, who are to determine the law.”).

55. The literature is boundless. For a representative collection of essays, see *LEX MERCATORIA AND ARBITRATION* (Thomas E. Carbonneau ed., 1990). More recently, see also A. CLAIRE CUTLER, *PRIVATE POWER AND PUBLIC AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* (2003); Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUR. L.J. 400 (2002).

56. See Berthold Goldman, *Frontières du droit et “lex mercatoria,”* 9 ARCHIVES DE PHILOSOPHIE DU DROIT 177 (1964); BERTHOLD GOLDMAN, *LEX MERCATORIA* (1983).

57. See Clive M. Schmitthoff, *International Business Law: A New Law Merchant*, in 2 CURRENT LAW AND SOCIAL PROBLEMS 132 (R. St. J. Macdonald ed., 1961).

58. KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* (1999); Charles N. Brower & Jeremy K. Sharpe, *The Creeping Codification of Transnational Commercial Law: An Arbitrator's Perspective*, 45 VA. L. INT'L L. 199 (2004).

59. See, e.g., Zumbansen, *supra* note 55, at 402-17.

60. See Andreas Kappus, “Lex mercatoria” als Geschäftsstatut vor Staatlichen

Like the autonomous law of the Internet, *lex mercatoria* is contested both on conceptual and normative grounds. This is true already for the alleged ancient *lex mercatoria*, which, at least as a substantive body of law, was in all likelihood a myth.<sup>61</sup> Similarly, opponents of the new *lex mercatoria* argue that it is not “law” in a meaningful sense but at best a developing normative order of trade customs and of “case law” for arbitrators, which is always connected back to the law of the state in two ways. First, it can become applicable only insofar as state law recognizes it through the granting of freedom of contract. Second, since arbitral decisions can be enforced only by the state’s courts, the state gets the last word on recognition or rejection of *lex mercatoria*.<sup>62</sup> Proponents, on the other hand, point out that the new merchant has all the elements necessary for state law<sup>63</sup> including even the internal problems of state law.<sup>64</sup> Again, the answer depends on the question—is *lex mercatoria* sufficiently comparable to state law, as proponents argue, or does it lack the formal elements of state law, as opponents hold?

Even more prominent than the debate concerning the Internet is the debate as to whether *lex mercatoria* can be the applicable “law” in litigation. This debate focuses mostly on arbitration but also addresses state courts and state conflict of laws.<sup>65</sup> Proponents point out that *lex mercatoria* is not only law in every relevant sense but is even superior to national laws because of its transnational character.<sup>66</sup> Opponents, on the other hand, emphasize that no contract can exist outside a national legal order and that therefore *lex mercatoria* cannot substitute for a national applicable law.<sup>67</sup>

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*Gerichten im Deutschen Internationalen Schuldrecht*, 13 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRax] 137 (1993).

61. See Oliver Volckart & Antje Mangels, *Are the Roots of the Modern Lex Mercatoria Really Medieval?*, 65 S. ECON. J. 427 (1999); Albrecht Cordes, *The Search for a Medieval Lex Mercatoria*, OX. U. COMP. L. FORUM (2003); Charles Donahue Jr., *Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica*, 5 CHI. J. INT’L L. 21 (2004); Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval “Law Merchant,”* 21 AM. U. INT’L L. REV. (forthcoming 2006); Foster, *supra* note 49; but see Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INT’L L. 39 (2004).

62. VON BAR & MANKOWSKI, *supra* note 4, at 81.

63. E.g., Teubner, *Global Bukowina*, *supra* note 18.

64. Zumbansen, *supra* note 55, at 417-28.

65. Compare Friedrich Juenger, *The Lex Mercatoria and Private International Law*, 60 LA. L. REV. 1133, 1141 (2000), with VON BAR & MANKOWSKI, *supra* note 4, at 86-88.

66. E.g., Juenger, *supra* note 65.

67. E.g., VON BAR & MANKOWSKI, *supra* note 4, at 81.

*B. From State Legal Pluralism to Global Legal Pluralism*

Both in the realm of the Internet and in that of the new *lex mercatoria*, the decisive question is whether these normative orders are “law.” This is the question addressed by theories of legal pluralism,<sup>68</sup> sometimes also called legal plurality<sup>69</sup> or legal polycentricity.<sup>70</sup> Legal pluralism posits that the state is not the only producer of law; non-state communities can produce law as well.<sup>71</sup> The old concept of legal pluralism, sometimes called state legal pluralism, posed no threat to the state’s legal authority because it acknowledged the central position of the state and assumed the various non-state legal orders existed only under its umbrella.<sup>72</sup> Legal anthropologists recognized non-state legal orders, especially in colonies.<sup>73</sup> Western colonizing nations had introduced their own legal orders to their colonies, but below those, with or without the acknowledgment of the official law, other legal orders lived on.<sup>74</sup>

Originally focusing mainly on non-Western societies, legal anthropologists looked mainly to colonies and their laws.<sup>75</sup> Soon, however, researchers found that, although the coexistence of various legal orders was more openly present in colonial systems, such a normative plurality existed in Western states as well.<sup>76</sup> In fact, such an analysis had already been done.

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68. See WARWICK TIE, *LEGAL PLURALISM* (1999); JØRGEN DALBERG-LARSEN, *THE UNITY OF LAW: AN ILLUSION?* (2000); Gordon R. Woodman, *Ideological Combat and Social Observation: Recent Debate about Legal Pluralism*, 42 J. LEGAL PLURALISM 21 (1998); Franz von Benda-Beckmann, *Who’s Afraid of Legal Pluralism?*, 47 J. LEGAL PLURALISM 37 (2002) [hereinafter von Benda-Beckmann]; William Twining, *A Post-Westphalian Conception of Law*, 37 L. & SOC’Y REV. 199, 248-51 (2003).

69. See SANTOS, *supra* note 7, at 89-98.

70. See Surya P. Sinha, *Legal Polycentricity*, in CONSEQUENCES OF PLURALISM IN LAW (Hanne Petersen & Henrik Zahle eds., 1995); SURYA PRAKASH SINHA, *LEGAL POLYCENTRICITY AND INTERNATIONAL LAW* (1996). The analogue in political science is sometimes called multicentric governance. See DAVID HELD, *GLOBAL COVENANT* 75-86 (2004).

71. von Benda-Beckmann, *supra* note 68, at 37.

72. See M. B. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* (1975). For an analysis of the relationship between state and law from the perspective of legal pluralism, see von Benda-Beckmann, *supra* note 68, at 52-57.

73. For legal pluralism as a phenomenon of colonialism and post-colonialism, see LAUREN BENTON, *LAW AND COLONIAL CULTURES* 2-3, 9-10 (2002).

74. *Id.*

75. For a distinction between two periods of legal pluralism, one focusing on colonial and postcolonial societies and one focusing on modern capitalist societies, see Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC’Y REV. 869 (1988).

76. Cf. BENTON, *supra* note 73, at 9 (“Colonies were not distinctive because they contained plural legal orders but because struggles within them made the structure of the plural legal order more explicit.”); see Lauren Benton, *Beyond Legal Pluralism: Towards*

Early in the twentieth century, Eugen Ehrlich had developed the idea that, even within the Western nation state, a multiplicity of normative orders existed which deserved to be called law.<sup>77</sup> Ehrlich juxtaposed law in the books and living law and postulated that the essence of law was not produced in texts or by state authorities but was developed in society:<sup>78</sup> “The center of gravity of legal development therefore from time immemorial has not lain in the activity of the state, but in society itself, and must be sought there at the present time.”<sup>79</sup> As a consequence, a plurality of legal orders, most of them non-state orders, could co-exist within one territory. The state provided an elaborate system of conflict of laws to mediate between the different legal orders.<sup>80</sup> At the same time, the state still provided the overarching, universal umbrella of a supreme and subsuming legal authority.<sup>81</sup>

This phenomenon of state legal pluralism has been criticized as being unduly centered on the state<sup>82</sup> and for that reason unduly ethnocentric,<sup>83</sup> since the state is a peculiarly Western concept. Therefore, more recent

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*a New Approach to Law in the Informal Sector*, 3 SOC. & LEGAL STUD. 223 (1994).

77. EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 13-14, *passim* (1936) (2d ed. 2002). The most comprehensive study of Ehrlich's life and work is STEFAN VOGL, *SOZIALE GESETZGEBUNGSPOLITIK, FREIE RECHTSFINDUNG UND SOZIOLOGISCHE RECHTSWISSENSCHAFT BEI EUGEN EHRLICH* (2003). See Assaf Likhovski, *Czernowitz, Lincoln, Jerusalem, and the Comparative History of American Jurisprudence*, 4 THEORETICAL INQUIRIES L. 621, 626-29 (2003) (referencing unfortunately only sources in English); see also David Nelken, *Law in Action or Living Law? Back to the Beginning in Sociology of Law*, 4 LEGAL STUD. 157, 165 (1984).

78. Eugen Ehrlich, *Die Erforschung des lebenden Rechts*, 35 SCHMOLLERS JAHRBUCH FÜR GESETZGEBUNG, VERWALTUNG UND VOLKSWIRTSCHAFT IM DEUTSCHEN REICH 129 (1911); Eugen Ehrlich, *Das lebende Recht der Völker der Bukowina*, 1 RECHT UND WIRTSCHAFT 273, 322 (1912). Both articles are reprinted in EUGEN EHRLICH, *RECHT UND LEBEN* 11, 43 (Manfred Rehbinder, ed., 1967).

79. EHRLICH, *supra* note 77, at 390. For Ehrlich, this was the one sentence that “contains the substance of every attempt to state the fundamental principles of the sociology of law.” *Id.* at xv.

80. A classical text on the treatment of non-Western law in conflict of laws is Roe Duco Kollwijn, *Conflicts of Western and Non-Western Law*, 4 INT'L. L.Q. 307 (1951). See G.W. Bartholomew, *Private Interpersonal Law*, 1 INT'L & COMP. L.Q. 325 (1952); Kurt Lipstein & István Szász, *Interpersonal Conflict of Laws*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (Vol. III/10 1985).

81. See, e.g., ROBERTO M. UNGER, *KNOWLEDGE & POLITICS* 281-84 (1975).

82. See John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1 (1986); Martha-Marie Kleinbans & Roderick A. Macdonald, *What is a Critical Legal Pluralism?* 12 CAN. J. L. & SOC'Y 25, 30-33 (1997).

83. See Christoph Eberhard, *Towards an Intercultural Legal Theory: The Dialogical Challenge*, 10 SOC. & LEGAL STUD. 171, 176-181 (2001) (describing the work of legal anthropologist Michel Alliot); von Benda-Beckmann, *supra* note 68, at 53-55.

approaches attempt to generalize the idea of legal pluralism. Since this rejection to grant a central position for the state mirrors a similar rejection in globalization theory, the approach has been used for globalization under the notion of global legal pluralism.<sup>84</sup> For example, Gunther Teubner has expanded both Ehrlich's living law and the traditional understanding of legal pluralism to a global theory, under the title of "global Bukowina," invoking Ehrlich's studies of the Bukowina as an area with numerous different non-state legal orders.<sup>85</sup> Francis Snyder has developed a concept of global legal pluralism consisting of a structural element—the involvement of "a variety of institutions, norms, and dispute resolution processes located, and produced, at different structured sites around the world,"<sup>86</sup>—and a relational element, concerning the relations between such sites.<sup>87</sup> Oren Perez presents, under the name of global legal pluralism (but without explicit relation to theories of legal pluralism), a more public-law-oriented concept of legitimate authority of non-state actors.<sup>88</sup> Boaventura de

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84. The term is used with different meanings, most prominently by Francis Snyder, Oren Perez, and Gunther Teubner. See the references in the following footnotes. For other authors using the concept, see Martti Koskenniemi, *Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought* 12-17 (2005), available at <http://www.valt.helsinki.fi/blogs/eci/PluralismHarvard.pdf> (last visited Oct. 31, 2005); Sally E. Merry, *Human Rights and Global Legal Pluralism: Reciprocity and Disjuncture*, in *MOBILE PEOPLE MOBILE LAW* 215 (Franz von Benda-Beckmann et al. eds., 2005). See also Berman, *Law and Globalization*, *supra* note 5, at 538-40; Keebet von Benda-Beckmann, *Globalisation and Legal Pluralism*, 4 INT'L L. FORUM DU DROIT INT'L 19 (2002); Luca Giuseppe Pes, *Il Pluralismo Giuridico*, 190-205 (2003), available at <http://www.dhdi.free.fr/recherches/theoriedroit/memoires/pesmemoir.pdf> (last visited Oct. 31, 2005). The application of pluralist theory to transnational legal processes predates the term; see Sally Engle Merry, *Anthropology, Law and Transnational Processes*, 21 ANN. REV. OF ANTHROPOLOGY 357 (1992).

85. Teubner, *Global Bukowina*, *supra* note 18, at 16; Fischer-Lescano & Teubner, *supra* note 8, at 1009-12; Teubner, *Global Private Regimes*, *supra* note 18.

86. Francis Snyder, *Governing Economic Globalisation: Global Legal Pluralism and European Law*, 5 EUR. L.J. 334, 342 (1999).

87. *Id.*; see Francis Snyder, *Global Economic Networks and Global Legal Pluralism*, in *TRANSATLANTIC REGULATORY COOPERATION* 100 (George Bermann et al. eds., 2000); Francis Snyder, *Economic Globalization and the Law in the Twenty-First Century*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 624 (Austin Sarat ed., 2003); Francis Snyder, *Éthique, OMC et pluralisme juridique mondial: Réflexions sur la gouvernance de la mondialisation*, in *MONDIALISATION ET ÉTHIQUE DES ÉCHANGES* (Yves Nauder ed., 2003); *INTERNATIONAL FOOD SECURITY AND GLOBAL LEGAL PLURALISM* (Francis Snyder ed., 2004).

88. Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 IND. J. GLOBAL LEGAL STUD. 25 (2003); OREN PEREZ, *ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM* (2004); Oren Perez, *Global Legal Pluralism and Electronic Democracy*, in *ELECTRONIC DEMOCRACY MOBILISATION, ORGANISATION AND PARTICIPATION VIA NEW ICTS* 133 (Routledge ECPR

Sousa Santos postulates a third period of legal pluralism after the traditional pluralism of the colonial/postcolonial context and the new pluralism of the modern capitalist state,<sup>89</sup> a third period which he describes as “postmodern legal plurality.”<sup>90</sup> William Twining presents a somewhat similar theory of a plurality of legal systems, of which the law of the state is only one.<sup>91</sup> Finally, Paul Schiff Berman, drawing on the work of Robert Cover,<sup>92</sup> draws a world of multiple overlapping communities, both territorial and non-territorial, that define themselves through the assertion of jurisdiction and in turn have jurisdiction because they are communities.<sup>93</sup> One consequence is that “the state does not hold a monopoly on the articulation and exercise of legal norms;”<sup>94</sup> non-state communities<sup>95</sup> produce laws as well and assert jurisdiction.<sup>96</sup> Jurisdiction, in this sense, is defined not as the assertion of state power (which, by definition, would be exclusive to the state) but rather as “the locus for debates about community definition, sovereignty, and legitimacy.”<sup>97</sup>

### C. Criteria for Determining “Law”

There are considerable differences between these concepts and among the theorists supporting them. There are disciplinary differences between commercial (Malynes, Berger), sociological (Ehrlich, Santos), anthropological (Berman), and jurisprudential (Twining, Teubner)

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Studies In European Political Science No. 33, Rachel Gibson et al. eds., 2004).

89. Merry, *supra* note 75, at 872.

90. SANTOS, *supra* note 7, at 92.

91. TWINING, *supra* note 7, at 82-88, 224-33; Twining, *supra* note 68.

92. See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) [hereinafter Cover, *Nomos and Narrative*]; Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179 (1985). For another reading of Cover's theory of jurisdiction as a theory of legal pluralism, see Emmanuel Melissaris, *The More the Merrier? A New Take on Legal Pluralism*, 13 SOC. & LEGAL STUD. 57, 65-68 (2004).

93. Berman, *Globalization of Jurisdiction*, *supra* note 5, at 427, 435-38, 501-12.

94. *Id.* at 493; *cf. id.* at 510 (“[T]he nation-state is denied any special status as a law-giver.”).

95. *Id.* at 472-90 (distinguishing subnational, transnational, supranational and cosmopolitan communities); *cf.* TWINING, *supra* note 7, at 139 (distinguishing global, international, regional, transnational, inter-communal, sub-state and non-state levels of law).

96. Berman, *Globalization of Jurisdiction*, *supra* note 5, at 323. “[I]f nation states are imagined, historically contingent communities . . . and if those nation-states . . . no longer define unified communities (if they ever did), then there is no conceptual justification for conceiving of nation-states as possessing a monopoly on the assertion of jurisdiction.” *Id.* at 464.

97. *Id.* at 319.



approaches. Methodologically, too, approaches differ from pragmatism,<sup>98</sup> to postmodernism,<sup>99</sup> to feminism,<sup>100</sup> to systems theory.<sup>101</sup> Yet all agree, in one way or another, that “law” cannot and should not be restricted to the law of the state. Of course, this leaves the problem of finding another criterion, and “where do we stop speaking of law and find ourselves simply describing social life?”<sup>102</sup> Most theorists are unhappy with the idea that “all social control is *more or less* ‘legal’;”<sup>103</sup> yet, they disagree about what the appropriate criteria should be.

By and large, one can distinguish two strands of criteria, depending on whether an outside observer or a participant is asked to distinguish law from non-law. The first strand represents the focus of a neutral, outside observer who wants to assess whether an observed normative order is law. To achieve objective criteria, many theorists use a functional definition of law. They call those orders “law” that fulfill the same functions as state law—for example, social control<sup>104</sup> or the resolution (or avoidance) of disputes.<sup>105</sup> Thus, if non-state orders similarly fulfill these functions, they must also be called and treated as law. Other outside observers use a structural rather than a functional definition of “law.” For example, Bronislaw Malinowski defined law through the structural device of obligations which create rights on one side and duties on the other.<sup>106</sup>

Theorists using the strand of internal criteria to assess what is law look at participants in a normative order and whether they treat what they have as law. Some theorists focus on language. They ask whether a particular normative order uses the binary code of legal/illegal<sup>107</sup> or, more simply, whether a normative order carries the label “law.”<sup>108</sup> Other theorists focus

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98. Klaus Peter Berger, *The New Law Merchant and the Global Market Place*, in *THE PRACTICE OF TRANSNATIONAL LAW* 1, 3 (Klaus Peter Berger ed., 2001).

99. SANTOS, *supra* note 7; see Santos, *supra* note 6, 293 (1987) (identifying legal pluralism as “the key concept in a post-modern view of law”).

100. Ambreena S. Manji, *Imagining Women’s “Legal World”: Towards a Feminist Theory of Legal Pluralism in Africa*, 8 SOC. & LEG. STUDIES 435 (1999).

101. Teubner, *Global Bukowina*, *supra* note 18, at 11.

102. Merry, *Legal Pluralism*, *supra* note 75, at 878.

103. Griffiths, *supra* note 82, at 39 n.3.

104. Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & SOC. REV. 719, 721 (1973); Griffiths, *supra* note 82, at 50 n.41; Woodman, *supra* note 68, at 45.

105. SANTOS, *supra* note 7, at 86.

106. BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 55 (1926).

107. LUHMANN, *supra* note 24, at 60, 61, 67-75, 165-87; Teubner, *The Two Faces of Janus*, *supra* note 16, at 1451.

108. BRIAN TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* 193 (2001); see Twining, *supra* note 68, at 223-31; Melissaris, *supra* note 92, at 69-70.

not on language but on the creation of communities. For them, law, or jurisdiction, is how communities assert themselves as communities.<sup>109</sup> Finally, other theorists in this second strand rely less on societal than on individual definitions. “Critical” legal pluralism adopts an “autobiographical” definition of law by the self and “presumes that legal subjects hold each of their multiple narrating selves up to the scrutiny of each of their other narrating selves, and up to the scrutiny of all the other narrated selves projected upon them by others.”<sup>110</sup>

Obviously, these criteria will frequently lead to different results. Also, none of them is fully convincing. Functional approaches are problematic for two reasons. First, state law fulfills a number of functions. Since few normative orders will fulfill all the functions that state law fulfills, one must choose the relevant function; but that choice must be arbitrary. Second, in any system, the functions of law can be fulfilled by functionally equivalent institutions that are not law. By calling all of these institutions “law,” the term loses its analytical purchase. A structural explanation focusing on “binding obligations” encounters the problem of distinguishing legal from other obligations and, consequently, law from customs, as Bohannan pointed out again Malinowski.<sup>111</sup> The focus on language creates problems of translation, such as determining the code “legal/illegal” and the equivalent of “law” in the perhaps esoteric language of a non-state society.<sup>112</sup> The mere focus on communities definition tends to essentialize cultural—law becomes a mere derivative from an assumed a priori idea of culture.<sup>113</sup> Again, the question of whether or not non-state orders qualify as “law” cannot be answered in the abstract. Again, “it depends entirely on the question you are asking.”<sup>114</sup>

At the same time, the answer to this question does not have direct consequences. Therefore, legal theorists may consider it futile but also unnecessary to distinguish strictly legal and non-legal.<sup>115</sup> Nothing follows directly from characterizing a certain normative order as “law.” This is an almost necessary consequence of the criteria used. If the determining

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109. See *supra* notes 92-96 and accompanying text; see generally Brian Tamanaha, *The Folly of the ‘Social Scientific’ Concept of Legal Pluralism*, 20 J.L. & Soc’y 192 (1993).

110. Kleinhans & Macdonald, *supra* note 82, at 46.

111. Paul Bohannan, *The Different Realms of the Law*, 67 AM. ANTHROPOLOGIST 33, 36 (1967).

112. Cf. TAMANAHA, *supra* note 108, at 189-91.

113. This is the criticism voiced again Paul Berman by Fischer-Lescano & Teubner, *supra* note 5, at 1004 n.18. The criticism is not entirely justified however. Berman combines community definition with the additional element of jurisprudence. See *infra* part IV.D.

114. Post, *supra* note 39.

115. Twining, *supra* note 68, at 248-49.

criterion focuses on the view of an outside observer (function, structure), then such a characterization may be helpful for the observer's comparative or analytical projects, but it does not yield normative conclusions for participants. If, on the other hand, the determining criterion focuses on the participant's perspective (language, community definition), then it yields valuable insights on that participant's views but no insight as to the implications of this perspective for other normative systems, including the perspective of the state. Much legal pluralism is in this sense uncritical. This is not to say that there is not frequently a political project behind legal pluralism.<sup>116</sup> Early on, much of the old state legal pluralism was directed against the dictatorship of Western state law, first in the colonies and then in Western countries themselves. At the same time, much of this old state legal pluralism was used to justify colonial rule vis-à-vis non-state legal orders, which were often the artificial creation of local elites rather than independently valid norms. Similarly, global legal pluralism rests on a politic of recognition:<sup>117</sup> multiple groups claim recognition of their status, their autonomy, and their lawmaking capacity vis-à-vis the monopoly of the state. Yet these political projects are not inherent in the analytical concepts used.

### III. RE-STATING GLOBAL LEGAL PLURALISM: THE TREATMENT OF NON-STATE LAW AS NON-LAW

There is a field, however, that combines the outsider's view with the participant's normative interest; and that is choice of law. A court applying foreign law is an outside observer of that law; yet at the same time, it is obliged to apply that law in the spirit of a participant.<sup>118</sup> In addition, choice of law is a field for which the distinction of law and non-law is practically important because choice of law rules determine the applicable *law*, not non-law. Both of these points make the perspective of conflict of laws on global legal pluralism particularly interesting. In fact, choice of law can provide us with the best forum in which to debate the practical implications of legal pluralism. Legal pluralism is about law; is it therefore also about choice of law? Legal pluralism is about recognition; is it therefore also

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116. For the unclear relation between analytical and political projects of legal pluralism, see SANTOS, *supra* note 7, at 89-91.

117. Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25 (Amy Gutman ed., 1994).

118. See Nils Jansen & Ralf Michaels, *Die Auslegung und Fortbildung ausländischen Rechts*, 116 ZEITSCHRIFT FÜR ZIVILPROZESS 3 (2002).

about the recognition of decisions? What, in fact, is the connection between global legal pluralism and conflict of laws? Can the state (with its institutions and in particular its courts) ignore the emerging non-state normative orders, or must the state eventually accommodate these orders as law?

The answer in regard to actual state practice is both yes and no. It will become apparent that non-state normative orders are almost never the applicable law under current choice of law analysis. However, this does not mean that the state is blind to such orders. Not recognizing the normative orders of non-state communities as law does not mean that the state is altogether ignoring these orders. A totalitarian state may try to do this; it may claim a normative monopoly. The liberal state, on the other hand, grants spaces of freedom, including the freedom to set non-state norms. This suggests that the liberal state can claim no more than legal supremacy. It does not deny the existence of other normative orders, but it either designates such orders as non-legal or it subordinates such orders to the state's own law. Normative orders are thus defined, by the state, with relation to the state. They are, in other words, "re-stated."

There are, in fact, a number of different ways for the state to deal with non-state norms. I suggest a typology of three such ways besides rejections: incorporation, delegation, and deference.<sup>119</sup> Incorporation is the transformation of non-state law into domestic law. Deference is the transformation of non-state law into facts. Delegation is the transformation of non-state law into subordinated state law. For an accurate picture, it is necessary to look at all of these methods together.

#### *A. Rejection—The Restriction of Applicable Law to State Law*

Viewed narrowly, it may seem that the state rejects global legal pluralism. Through its choice of law regime, the state rejects any claim by non-state normative orders to be treated as law virtually without exception. To that extent, it rejects global legal pluralism. Thus, the ongoing debate about the character of the new *lex mercatoria* as "law" has not, it seems, led any national court to apply this new *lex mercatoria* as recognized law.<sup>120</sup>

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119. For a comparable typology, see Steven Schwarcz, *Private Ordering*, 97 Nw. U. L. REV. 319, 324-29 (2002). Berman also discusses these three different types of interaction but does not distinguish between them. See Berman, *Globalization of Jurisdiction*, *supra* note 5, at 505-06 (stating "official legal actors may delegate lawmaking authority to non-state entities" [delegation], "or recognize the efficacy of non-state norms" [recognition], and "the norms they [i.e. non-state actors] articulate often seep into the decisions of state legal institutions" [incorporation]).

120. See, e.g., *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd.*, (2003)

True, courts have sometimes declared arbitral awards enforceable when based on the application of *lex mercatoria*. Proponents of the new *lex mercatoria* often point to such decisions to prove that state courts now recognize *lex mercatoria* as law.<sup>121</sup> Yet this argument rests on a confusion between choice of law and the recognition of arbitral awards.<sup>122</sup> States recognize and enforce arbitral awards without allowing re-litigation on the merits. In particular, the enforcing court will not normally second-guess whether the arbitrator applied the correct law in a choice of law analysis. Even arbitral awards based not on the application of any law but given *ex aequo et bono* are enforced.<sup>123</sup> In other words, the arbitral award is enforced regardless of what law was applied. This is the opposite of an explicit endorsement of the applied normative order as “law.”

The situation is similar for another non-state normative order: Islamic law or Shari’a. To the extent that Islamic law has been formally adopted as the law of a country, it becomes applicable as that country’s law. Without such adoption, however, as non-state law Islamic law remains outside the choice of applicable laws. A recent English case illustrates this neatly.<sup>124</sup> Parties to a contract concerning Islamic banking had agreed that English law was applicable, but that the contract was “subject to the principles of the Glorious Shari’a.”<sup>125</sup> The judge held that under the applicable Rome Convention on the Law Applicable to Contractual Obligations,<sup>126</sup> Shari’a was not a law that could be chosen as applicable law.<sup>127</sup> In other words, regardless of whether Shari’a was “law” in a general sense, it was not law in the context of conflict of laws.

Exceptions are notable largely because they are so rare. A proposal for an Inter-American Convention on the Law Applicable to International

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EWHC 2118 (Q.B.), no. 37 (“The [*lex mercatoria*], or general law of merchants . . . is not the law of a country which is capable of ascertainment by expert evidence from practitioners in the country”). *But see* Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 974-76, 979-81 (1991).

121. *E.g.*, GOLDMAN, *supra* note 56, at 13.

122. *See* Ralf Michaels, *Privatautonomie und Privatkodifikation*, 62 RABELSZ 580, 620 (1998).

123. *See* UNCITRAL Model Law on International Commercial Arbitration, art. 28(3), 25 I.L.M. 1302 (1985).

124. *Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd.* (2004) EWCA Civ. 19 [hereinafter *Shamil Bank*].

125. *Id.* at no. 1.

126. 1980 O.J. (L 266), reprinted in 19 I.L.M. 1492.

127. *Shamil Bank*, *supra* note 124, at 40, 48. *See* Kilian Bälz, *Islamic Law as Governing Law under the Rome Convention. Universalist Lex Mercatoria v. Regional Unification of Law*, 6 UNIF. L. REV. 37, 44 (2001).

Contracts<sup>128</sup> would have enabled parties to select non-state law if it came in a codified form,<sup>129</sup> relying primarily on the UNIDROIT Principles of International Commercial Contracts.<sup>130</sup> However, the proposed provision was not adopted.<sup>131</sup> Whether the Principles would be applicable under the current text appears doubtful<sup>132</sup> and also irrelevant because only Mexico and Venezuela have ratified the Convention.<sup>133</sup> More recently, the European Commission, in its Green Paper on the law applicable to contractual obligations,<sup>134</sup> asked interested parties whether parties to a contract should be able to select non-state law like *lex mercatoria* or the UNIDROIT Principles as the law applicable to their contracts.<sup>135</sup> While some respondents, primarily scholars,<sup>136</sup> were in favor of this proposal,<sup>137</sup> no

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128. Inter-American Convention of the Law Applicable to International Contracts, 33 I.L.M. 732 (1994) [hereinafter Inter-American Convention].

129. "If the parties have not selected the applicable law, or if this election proves ineffective, the contract shall be governed by the general principles of international commercial law accepted by international organizations." Quoted in Friedrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 AM. J. COMP. L. 383, 391 (1994). For a slightly different proposal, see Hernany Veytia, *The Requirements of Justice and Equity in Contracts*, 69 TUL. L. REV. 1191, 1194 (1995).

130. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2d ed. 2004).

131. Inter-American Convention, *supra* note 128, at art. 7. For further references, see Michaels, *supra* note 122, at 594-95.

132. For analysis, see RUBEN B. SANTOS BELANDRO, *EL DERECHO APLICABLE A LOS CONTRATOS INTERNACIONALES*, 69-74 (1996). See also Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 AM. J. COMP. L. 195, 204-05 (1997) (arguing that the final version of the convention allows for the choice of the UNIDROIT principles). The American delegation with Friedrich Juenger had proposed the applicability. See Juenger, *supra* note 129, 391-92.

133. See List of Signatory Countries to the Inter-American Convention of the Law Applicable to Commercial Contracts, available at <http://www.oas.org/juridico/english/Sigs/b-56.html> (last visited Nov. 16, 2005).

134. Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernization, COM (2002) 654 final (Jan. 14, 2003).

135. *Id.* at 22-23.

136. It is not surprising that scholars would support an approach to law that diminishes the monopoly of the state, and, therefore, has the potential of enhancing scholarly impact on the law. See Martijn W. Hesselink, *The Politics of European Contract Law: Who has an Interest in What Kind of Contract Law for Europe?*, 2 GLOBAL JURIST FRONTIERS, Part 1, Art. 3, 2-3 (2002); MARTIJN HESSELINK, *THE NEW EUROPEAN PRIVATE LAW*, 163, 164-65 (2002).

137. See, e.g., Max-Planck-Institut für Ausländisches und Internationales Privatrecht, *Comments on the European Commission's Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernization*, 68 RABELS Z 1, 32-33 (2004). Most responses are

decision has been taken. However, a newly proposed Regulation would, if enacted, enable parties to select the UNIDROIT Principles as applicable law.<sup>138</sup>

The situation is different within states. Non-state law is recognized and applied as law within certain countries below the level of state law. For example, India has different laws of marriage for its Hindu, Muslim, Parsee, Christian, and Jewish communities.<sup>139</sup> Which law applies to any given marriage depends on the allegiance of the spouses. This is a true interpersonal conflicts rule based on community affiliation. Here, the old kind of legal pluralism, state pluralism, is recognized in the conflict of laws. Such interpersonal conflicts rules are indeed the closest to a system of conflict of laws that recognizes the norm-making power of non-state communities. At the same time, these rules exhibit exactly those characteristics of the old state legal pluralism that the new legal pluralism tries to disavow. This system only applies within states as a kind of non-territorial federalism. If a foreign conflict of laws regime were to address the validity of a marriage between two Indian Muslims, it would not directly designate the application of their Muslim law but would instead designate the application of Indian law, which in turn would designate the application of Indian Muslim law as applicable. From the outside, all non-state law is mediated by the state.

#### *B. Incorporation—the Transformation of Non-State Law Into State Law*

Even if non-state norms are not applied as law, the state recognizes them nonetheless, albeit in other ways. First, state law recognizes non-state law by incorporation. *Lex mercatoria* may serve as a good example of incorporation, both in its historic and in its new fashion. *Lex mercatoria*, was able to retain its identity because of two important factors, one institutional and the other substantive. Institutionally, *lex mercatoria* was administered by special courts. Substantively, the principles applied by these special courts were often superior to the English common law because *lex mercatoria* was informed by the needs of commerce. Also, these special courts were international in their bases, having adopted elements from

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available at [http://europa.eu.int/comm/justice\\_home/news/consulting\\_public/rome\\_i/news\\_summary\\_rome1\\_en.htm](http://europa.eu.int/comm/justice_home/news/consulting_public/rome_i/news_summary_rome1_en.htm) (last visited on Nov. 16, 2005).

138. Proposal for a Regulation of the European Parliament and the Council on the Law applicable to contractual obligations (Rome I), at Art. 3(2), p. 5, COM (2005) 650 final (Dec. 15, 2005).

139. For what follows, see DAVID PEARL, *INTERPERSONAL CONFLICTS OF LAWS—INDIA, PAKISTAN AND BANGLADESH* (1981); Akolda M. Tier, *The Evolution of Personal Laws in India and the Sudan*, 26 J. INDIAN L. INST. 445 (1984).

Continental civil law that had eliminated many of the formalities riddling the English common law.

The English common law reacted by incorporation. Institutionally, common law courts adopted jurisdiction over *lex mercatoria*. Substantively, common law courts incorporated large parts of *lex mercatoria* into the common law and thereby avoided competition. The mentioned *Pillans* decision<sup>140</sup> is not proof for the statement that English courts recognized *lex mercatoria* as a separate body of law, but quite the opposite: Lord Mansfield's opinion<sup>141</sup> made clear that *lex mercatoria* was *not* a separate body of law but part of English law. Incorporation can also be observed in literature and legislation. For example, Wyndham Beawes' book on *lex mercatoria* was revised and enlarged in its sixth edition by none other than Joseph Chitty,<sup>142</sup> who later set out to write what is now the standard book on English contract law.<sup>143</sup> Similarly, Karl Llewellyn's draft for the Uniform Commercial Code took its inspiration, directly and indirectly, from the medieval *lex mercatoria*<sup>144</sup> through adaptation of the German Commercial Code, which, in turn, had been inspired by commercial practices and Levin Goldschmidt's ideas about "immanent law."<sup>145</sup> What appears to proponents of the autonomy of *lex mercatoria* to be the state's acknowledgment of that autonomy could be viewed equally well as *lex mercatoria*'s colonization or enslavement<sup>146</sup> by the state's law. Incorporation is perfectly compatible with Ehrlich's insight that the production of law mainly happens on the periphery, within society.<sup>147</sup> Yet the insight loses its revolutionary potential.

The state is able to domesticate this potentially subversive development through the incorporation of the norms that are created. It recognizes non-state communities as generators of norms, but it denies these norms the

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140. *Pillans*, 97 Eng. Rep. 1035.

141. *Id.*

142. BEAWES, *supra* note 50.

143. H.H. BEALE, CHITTY ON CONTRACTS (29th ed., 2004). The first edition was JOSEPH CHITTY, A TREATISE ON THE LAWS OF COMMERCE AND MANUFACTURES, AND THE CONTRACTS RELATING THERETO (1820).

144. Ingrid M. Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1148-51 (1984).

145. LEVIN GOLDSCHMIDT, HANDBUCH DES HANDELSRECHTS 302 (3d ed. 1875); KARL LLEWELLYN, THE COMMON LAW TRADITION 122 (1960). Cf. James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987).

146. I borrow the term from Teubner, *De Collisione Discursuum*, *supra* note 26, at 911-13.

147. EHRlich, *supra* note 79 and accompanying text.



status of autonomous law. Instead, by incorporating these norms into state law, the state reiterates its own monopoly on the production of legal norms.<sup>148</sup> By turning implicit law into made law, to use Lon Fuller's dichotomy,<sup>149</sup> the state can add substance to its otherwise thin and abstract norms,<sup>150</sup> meanwhile denying implicit law's independent existence. From this perspective, norms of *lex mercatoria* are law only insofar as they cease to be elements of *lex mercatoria* and become part of the law of the state.

*C. Deference—The Transformation of Non-State Law into Facts*

Incorporation alone would be insufficient as the state is unable to run all relevant non-state norms through its own formalized law-making process. A second means of dealing with non-state norms—again, one outside of conflict of laws—is deference to such norms as the basis of private transactions<sup>151</sup> or private ordering.<sup>152</sup> Such deference recognizes the normative autonomy of communities (and even of non-communities) and protects them from state regulation and interference by granting them a private space. At the same time, it denigrates the norms created by these communities to the status of facts for the purpose of legal analysis.<sup>153</sup> For example, the state may leave to commercial practices and professional standards the development of appropriate standards of care, reasonable expectations and the like. This is the approach most frequently seen as an answer to Ehrlich's "living law."<sup>154</sup> Again, the state does not ignore living law, but neither does the state recognize it as law. The state's law does not conceptualize its own relation to such spaces of private ordering as a relation to foreign entities and their laws, to be handled by rules of conflict of laws. Rather, the state refrains from interfering. Put differently, it defers to the private interactions of individuals. The whole public versus private distinction takes place not outside but within the framework of the state's law. Private ordering enters the substantive law of the state at the time of enforcement as fact. Customs, expectations, and the like must be taken into account in applying the state's laws; but the state does not recognize them as constituting law in and of themselves.

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148. See GOLDMAN, *supra* note 56, at 13.

149. LON FULLER, *ANATOMY OF THE LAW*, 70 (1968); cf. Gerald Postema, *Implicit Law*, 13 L. & PHIL. 361 (1994).

150. FULLER, *supra* note 149, at 91-110.

151. Cf. Teubner, *De Collisione Discursuum*, *supra* note 26, at 918. Teubner, however, speaks of "externalization." *Id.*

152. Schwarcz, *supra* note 119.

153. Cf. LUHMANN, *supra* note 24, at 86-88.

154. Ehrlich, *supra* note 78.

Far from being irrelevant, the distinction between law and fact is crucial here. If these practices were recognized as law and designated applicable law through a choice of law process, then those practices would be on equal footing with the state's own law. The state would apply these practices out of respect for the sovereignty of the norm-creating community, perhaps in the hope that this community would in turn be willing to apply the state's laws as well. If, however, these practices are recognized only as facts, they are subordinated to the state's laws and can only fill the space left open by the state's laws. The decision to grant such a space does not follow from the community's own sovereignty but rather from the state's determination that it is appropriate. The state does not assume the need for symmetrical reciprocity or comity between state and non-state communities because the state claims the monopoly of force. As a consequence, there is no doubt that non-state communities must "apply" the state's norms. So there is no need, legally speaking, to offer these communities a *quid pro quo*. Or rather, the necessary *quid pro quo* between state and community is not a legal category; reciprocity between state and non-state communities is asymmetrical.

*D. Delegation—The Transformation of Non-State Law into Subordinated Law*

Incorporation and deference both deny non-state normative orders any role as an autonomous legality. Incorporation strips such orders of their autonomy by translating them into the state's own law. Deference strips such orders of their legality by treating them as facts. A third operation, delegation, treats such orders as legal ones separate from the state's own law, but still denies them full autonomy. Through the process of delegation, the state acknowledges the self-regulation of interested groups instead of regulating them on its own.

Examples of delegation abound: autonomous labor agreements between unions and employers may have the force of law, codes of conduct of both regulated and unregulated industries substitute for possible regulation by the state, and so on. One could even call all contracts delegated law, as does the French Civil Code (at least nominally) in its famous Article 1134.<sup>155</sup> By raising private contracts to the status of law, French law seems, on the one hand, most open to recognizing the factual law-making power of non-state actors through private autonomy. On the other hand, French theorists have traditionally been most resolute in emphasizing that the binding force of the

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155. C. Civ. art. 1134 (1806) ("Agreements legally formed take the place of law for those who make them.").

contract rests entirely on the law.<sup>156</sup> Parties may enter into contracts; but these are enforceable only because the state, through its substantive private law, explicitly allows them to do so. By recognizing the contract as “law between the parties,” the state denies the contract the status of law beyond their privity.

In all these situations, non-state communities produce their own rules and the state acknowledges them as law but only as law that is subordinate to state law. Whether delegated norms come into being independently or whether they are created in response to delegation is irrelevant.<sup>157</sup> Entities or communities may well have created norms prior to, or independently of, any delegation by the state. The state’s delegation is frequently no more than the acceptance of a *fait accompli*. But from the state’s viewpoint, this does not change the nature of delegation or the subordination of these norms to those of the state. Rather, from the state’s standpoint, these norms acquire the status of law from the very moment they are attached and subordinated to the state and its law. Again, as with incorporation, as soon as these norms are recognized as law, they lose their autonomous status, though not as fully as they do in the case of deference. Non-state law turns into sub-state law.

#### *E. The State’s Legal Monopoly as Self-Immunization*

From the state’s point of view, then, non-state norms are recognized in various ways; but only state law is autonomous law. The norms of non-state communities become state law through incorporation, or become relevant facts through deference, or become subordinated law through delegation. In each case, they are invariably denied the status of autonomous law. The state thereby maintains its own legal monopoly. Nothing is law unless it is recognized as such by the state.

Since this emphasis on the state’s legal monopoly may sound extreme, it is important to understand what it does not imply. First, the distinction between law and non-law does not rest on an assumed natural priority of the state over other communities. The state’s monopoly does not exist in some objective way, as seen by a neutral observer. Such an assumption would be historically erroneous and factually doubtful today. Non-state communities with their own normative orders have existed prior to, and independent

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156. ROBERT J. POTHIER, *A Treatise on Obligations Considered in a Moral and Legal View* 76 (Francois-Xavier Martin trans., The Law Book Exchange, Ltd. 1999) (1802).

157. Somewhat surprisingly, Johnson and Post conceded this point and undermined their claim for the Internet’s autonomy when they conceived of Internet law as result of state delegation. See Johnson & Post, *supra* note 31, at 1394 n.82.

from, the state. The point is not that such normative orders are secondary to the state's law in some abstract or universal way; or that they are, in actuality, only facts. The point is, rather, that the state conceptualizes them as such. It is from the perspective of the state and its law that the normative orders of these non-state communities are secondary normative orders, or just facts, vis-à-vis the state. A neutral observer may well observe the global legal pluralism described above, including laws of the state and laws of non-state communities on an equal footing. The state, from its perspective, does not.

Second, a legal monopoly is not the same as legal exclusivity. Just because the state does not recognize non-state orders as law does not mean that its law is immune from the influence of these orders or that its law cannot be "responsive law."<sup>158</sup> In fact, the opposite is true. The law of the state can be responsive precisely because it has developed subtle ways of dealing with these influences. Incorporation is a direct reaction (through translation) to non-state normativity. Delegation will be granted only if (and because) the state is convinced that non-state community self-regulation is superior to state regulation, typically in reaction to the community's request to be allowed to regulate itself. Deference is the acknowledgment that regulation through state law is contingent on facts, including facts that individuals can freely determine. In short, the state is able to deny non-state normative orders the status of "law" precisely because it has other ways to deal with them. By transforming non-state norms into its own law, into facts, or into subordinated law, the state can maintain its law-making monopoly without having to interfere with these norms themselves.

This last point is important for a third point: the state's monopoly on law-making does not imply that the state could have unlimited factual power to regulate all transactions. Globalization demonstrates that this is untrue and that non-state communities have actual powers that are at times equal, at times even superior to those of the state.<sup>159</sup> In fact, the array of operations of acknowledgment may well be regarded not as a sign of strength, but as one of weakness. Since the state's power is in fact limited and since the liberal state must grant spaces of liberty, it cannot avoid the creation and enforcement of non-state norms; nor does it want to do this. Therefore, it must find ways to accommodate them. The state can only hope to maintain its legitimacy and the legitimacy of its lawmaking monopoly if

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158. PHILIPPE NONET & PHILLIP SELZNICK, *LAW AND SOCIETY IN TRANSITION* 73-113 (1978).

159. See, e.g., SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN THE AGE OF GLOBALIZATION* (1996); but see Ralf Michaels, *Welche Globalisierung für das Recht? Welches Recht für die Globalisierung?*, 69 RABELSZ 525, 532-33 (2005).

it gives non-state communities sufficient space for the development and enforcement of their own norms.

There is a parallel observation: Treating non-state normative orders as law does not necessarily give them a greater practical importance than incorporation, deference, or delegation. Put another way, contrary to what some argue,<sup>160</sup> legal pluralism does not necessarily imply greater autonomy of non-state communities vis-à-vis the state. The different treatment of law and non-law is a difference of form, not of degree or substance. States may well treat foreign laws as law through conflict of law but still deny them applicability, either because their specific approach to conflict of laws contains a strong preference for the laws of the forum or because that approach uses a far-reaching public policy exception against foreign law. On the other hand, a liberal state may well give generous deference and delegation to non-state normative orders, enabling non-state communities to regulate their own affairs largely without interventions while denying them the status of law.

By simultaneously acknowledging non-state norms and denying them the status of law, the state immunizes itself against non-state norms. It acknowledges them as different from, not as similar to its own law. This does not mean, of course, that this is desirable. One may well argue that the state's self-immunization is an undesirable response to the challenge of global legal pluralism or that the state's attempt to maintain its legitimacy is doomed to fail. From the viewpoint of the state, however, this may be the only possible reaction that does not require a dramatic alteration of the state itself. This is reason enough to examine, in the next section, why the state reacts the way it does.

#### IV. THE DIFFERENCE BETWEEN STATE LAW AND NON-STATE NORMATIVE ORDERS

##### *A. The Relativism of Choice of Law*

Some argue that the restriction of applicable law to state law is unjustified because non-state normative orders are also "law." Often, the argument is a functionalist one—non-state normative orders are functionally no less "laws" than those of the state, so the state must recognize them as such. For example, Johnson and Post's claim for a "jurisdiction" of the Internet is based on a claim that, functionally, the Internet is like a state territory.<sup>161</sup> Juenger's argument for applicability of lex

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160. See, e.g., DALBERG-LARSEN, *supra* note 68, at 168-69.

161. Johnson & Post, *supra* note 31, at 1378-80.

mercatoria is grounded in the claim that *lex mercatoria* is a law in all relevant respects.<sup>162</sup>

Insofar as the functionalist argument is meant as a logical one, it rests on a conceptual fallacy. The argument consists in simple syllogism of the following kind: *lex mercatoria* is law; conflict of laws designates what law to apply; thus conflict of laws must also, if all other criteria are met, (e.g. *lex mercatoria* has been chosen by the parties) designate *lex mercatoria* as applicable law. This syllogism presupposes a uniform definition of “law” in both premises. Yet even within legal pluralism, different scholars propose different definitions. Moreover, legal pluralism, legal sociology, and legal anthropology may well have different definitions of law because they are interested in different aspects of law. From a sociological or anthropological perspective, it may (or may not) make sense to refer to all normative orders in communities as “law.” Yet, this is not necessarily the legal perspective, intrinsic to operations of the legal system itself.<sup>163</sup> The claim that *lex mercatoria* is “really” law must be rejected simply because there is no one reality here. Law is a social construct;<sup>164</sup> therefore, the definition of what law is depends on the criteria used, and these criteria can easily be different in different disciplines.<sup>165</sup>

Even if we thought that non-state law should indeed be considered “law” within legal theory or legal sociology, this would not mean that it must be law in the sense of conflict of laws. Teubner’s point that “[t]he debate on [*lex mercatoria*] is one of the rare cases in which practical legal decision-making becomes directly dependent upon legal theory”<sup>166</sup> is inexact. Legal theory and conflict of laws may well work with different notions of “law.” Conflict of laws norms are part of the law of each individual state; absent treaties, the question of which law applies is determined, in the last instance, by the state. As a consequence, from the perspective of state choice of law, what qualifies as “law” is a question for state law to determine through characterization. This need to characterize institutions specifically for the purposes of choice of law is nothing new.

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162. Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VA. J. INT’L L. 487, 490-92 (1995).

163. Michaels, *supra* note 122, at 615; see HANS Kelsen, *DER SOZIOLOGISCHE UND DER JURISTISCHE RECHTSBEGRIFF* (1922) and the debate between Ehrlich and Kelsen on the notion of law in HANS Kelsen & EUGEN EHRLICH, *RECHTSSTOZIOLOGIE UND RECHTSWISSENSCHAFT-EINE KONTROVERSE* (1915/17) (2003).

164. Cf. LEOPOLD POSPISIL, *ANTHROPOLOGY OF LAW* 39 (1971).

165. Cf. von Benda-Beckmann, *supra* note 68, at 39-42 (pointing out that different discourses may need different concepts, and that legal pluralism may not be helpful for judges).

166. Teubner, *Global Bukowina*, *supra* note 18, at 9.

For example, in order to determine whether a rule in a foreign law must be considered penal (which would bar its applicability under the so-called penal rule),<sup>167</sup> courts are asked to determine whether the rule is penal in the international sense rather than in some general sense.<sup>168</sup> Similarly, the determination of whether rules are substantive, thus governed by the otherwise applicable law, or procedural, and thus governed by the law of the forum, is made with regard to the specific requirements of choice of law.<sup>169</sup> In the same way, a state is free to determine whether it will recognize non-state law as “law” or not. The question is not one of legal theory, but rather one of construing the relevant conflict of laws rule.

Twining makes a similar point of relativity of position (though not with the same purpose as here) when he states:

Indeed, the very existence of pluralism depends on standpoint: an English judge presented with an issue involving a potential clash between English and Islamic principles may not even perceive or acknowledge that there is a conflict, let alone accept that Islamic law is valid “law” in this context, whereas a devout Muslim may believe that Islamic Law trumps English law.<sup>170</sup>

Yet, Twining’s formulation is more psychological than analytical. Twining focuses on different modes of thought between the “English judge” and the “devout Muslim,” rather than on the different normative systems for whose standpoints the question must be answered. This does not fully grasp the relativity involved. After all, the English judge may well be a devout Muslim herself and still have to face the same conflict. As an English judge, she will have to hold that Shari’a is not law, at least in the positivistic sense of the Convention on the Law Applicable to Contractual Obligations.<sup>171</sup> As a Muslim, on the other hand, she may recognize Muslim law not only as “law” but as a law higher than English law. Neither of the two is a global, universal position. In this sense, neither position is “correct” in the way a scientific analysis may aim at being correct. The difference in perspective then is not that of different individuals but that of different reference systems. Importantly, these are not different substantive law reference

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167. *SCOLES*, *supra* note 3, at 145-47.

168. *See Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 198-99 (N.Y. 1918).

169. WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS*, ch. 6 (1942); *Grant v. McAuliffe*, 264 P.2d 944, 946-49 (Cal. 1953).

170. Twining, *supra* note 68, at 250. Here, Twining refers to Islamic Law as non-state law as opposed to the national codifications, or incorporations, of Shari’a in various countries.

171. *Shamil Bank*, *supra* note 124.

systems (the everyday topic that is dealt with by conflict of laws) but rather different conflict of laws reference systems: one of state law vis-à-vis non-state law and the other of non-state law vis-à-vis state law.

*B. The Special Treatment of Foreign State Law*

Is the law of foreign states treated differently? Some have indeed argue proposed that conflict of laws in its treatment of foreign laws does not function any differently from the three operations of incorporation, deference, and delegation. All three operations are found in discussions about the nature of choice of law, as different attempts to overcome the assumption that all foreign law must simply be rejected, not because it is not law, but because it is foreign. The idea of incorporation can be found in the so-called local law theory, advocated by Walter Wheeler Cook. Cook argues that a judge always applies local law; but in interstate cases, this local law may replicate the content of foreign law.<sup>172</sup> Incorporation is found also in Roberto Ago's theory of naturalization—that the state creates special substantive norms for international cases and these special norms naturalize or incorporate foreign legal norms.<sup>173</sup> Likewise, the concept of deference exists in the conflict of laws. Foreign law is still sometimes regarded as mere fact, especially for the purpose of proving foreign law.<sup>174</sup> Some theories even construe foreign law as fact in general, most notably Ehrenzweig in his idea to treat foreign law as “datum” in a judicial decision.<sup>175</sup> Finally, while no explicit theory of delegation as a basis of conflict of laws exists, one could well regard the functioning of the traditional choice of law rule as such: foreign law is “law” if and only to the extent that domestic law, through its choice of law rules, delegates law-making authority (vis-à-vis domestic courts) to the foreign lawmaker. Thus, the choice of law rule would function as a quasi-Hartian rule of recognition.<sup>176</sup>

Yet all of these theories have had fairly little influence on the theory and practice of conflict of laws. Generally, foreign law is applied as law. If it is not applied, the reason is not that it is not “law” but rather that it is not the *applicable* law. In other words, while it would be possible to

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172. COOK, *supra* note 169, at 20-21.

173. ROBERTO AGO, *RÈGLES DES CONFLITS DE LOIS*, 1936-IV Rec. des Cours 302-08.

174. SCOLES, *supra* note 3, 543-45. For critique, see Jansen & Michaels, *supra* note 118, at 13-14.

175. See SCOLES, *supra* note 3, at 38-43.

176. Cf. Teubner, *Breaking Frames*, *supra* note 21, at 153 (quoting MICHEL VAN DE KERCHOVE & FRANÇOIS OST, *LE DROIT OU LES PARADOXES DU JEU* 179 (1992)).



conceptualize the application of foreign law as incorporation, deference, or delegation, this is not the normal conceptualization. The underlying assumption is that the quality of foreign state law as law neither depends on nor commands the theory of its applicability.

### *C. Jurispersuasion and the State*

This different treatment of foreign laws and of non-state norms leads to a puzzle. If, indeed, the state claims legal supremacy, why would it treat any normative order other than its own as “law?” Yet this is exactly what happens with foreign laws in the choice of law process. Why would the state—with its claim to a legal monopoly—treat the laws of foreign states as laws in the conflict of laws process and only deny non-state normative orders similar dignity? Why would the state use the instruments of incorporation, deference, and delegation towards non-state normative orders but not towards foreign law?

These questions do not yield obvious answers. For purposes of choice of law, the question of whether non-state normative orders are “law” is answered from the position of each specific state and its law. This does not explain why the state answers the way it does. Nor is it enough to point out that the state uses a simple formal criterion like “state-based norms” to distinguish law from other normative orders, because the discipline of conflict of laws, at least in the United States, has moved away from the rigorous formalism of the First Restatement and has adopted an openly functionalist approach.<sup>177</sup> Why, then, is this functional approach not universally extended to the question of what normative orders can be recognized as “law?” Why do we not at least find some states that do and some states that do not recognize non-state orders as “law?”

These questions lead us to the core of the problem. Legal pluralists argue that the state should be willing, at least *prima facie*, to enforce the decisions and laws of such communities, just as the state already enforces decisions of foreign states’ courts and the laws of foreign states.<sup>178</sup> Such enforcement does not follow automatically from the nature of “law,” because what matters for choice of law is not an ontological definition of law, but rather, the determination of what is law from the perspective of the state and its choice of law norms. This makes it plausible to develop a discursive criterion for this determination of law. Such a criterion is

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177. See SCOLES, *supra* note 3, at 18-105.

178. Cf. Berman, *Globalization of Jurisdiction*, *supra* note 5, at 511-12; Berman, *Law and Globalization*, *supra* note 5, at 534.

Berman's "jurispersuasion."<sup>179</sup> His argument is that communities that want their norms and their decisions to be enforced by states (even if these norms diverge from those of the states) must convince the states of their status as law-creating and autonomous.<sup>180</sup> This argument for recognizing non-state law is indeed one of definition: since non-state normative orders are "law" in a theoretical sense, they must also be "law" in the sense of conflict of laws. However, this is only part of the argument. In addition, the argument is discursive: non-state law is "law" only because and insofar as the non-state community can convince the state that it is.

Why should states be convinced? Do states have a governmental interest in such an application? While not addressing this question directly, Berman makes arguments for a multilateral approach to choice of law between state laws that could be translated into the context of legal pluralism:

[A] cosmopolitan approach is firmly grounded in an expanded notion of governmental interests. Indeed, as courts consider multiple community affiliations and develop hybrid rules for resolving multistate disputes, they do so not because they are *ignoring* the policy choices of their home state, but because they are *effectuating* their state's broader interest in taking part in a global community. Thus, a cosmopolitan approach is ultimately moored to an expanded conception of how governments must operate in an interconnected world.<sup>181</sup>

If, according to global legal pluralism, this interconnected global community is made up of both states and non-state communities, one might well argue that participants in the global community must be ready to apply

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179. Berman, *Law and Globalization*, *supra* note 5, at 534. Jurispersuasion is reminiscent, as a concept, of the "new sovereignty" introduced by Abram and Antonia Chayes as the "connection to the rest of the world and the ability to be a political actor in it." See ABRAM CHAYES & ANTONIA CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 26 (1995).

180. Berman, *Law and Globalization*, *supra* note 5, at 534.

181. Berman, *Cosmopolitan Vision*, *supra* note 5, at 1864-65; *cf. id.* at 1867 ("[T]he long-term interests that states have in being part of an interlocking world order.").

[C]onflicts rules based on parochial preferences for forum law are apt to turn into legal imperialism unless one's idea of a government's self-interest expands to include an interest in being a cooperating member of the global community. . . . Because states are inevitably embedded in an international system, they internalize the aspirations and disciplining norms of that international system and have an important interest in being a cooperative member of a global community. *Id.* at 1880-81.

the norms made by non-state communities.

The argument (which may not be Berman's) is intriguing. However, it rests on the assumption that states have an interest in recognizing non-state normative orders as law; and this may be unlikely. First, the state's interest in taking part in a global community may not translate easily from a world of states and their laws to a world of global legal pluralism. Berman uses a popular argument to rebut the idea that it is always in a state's interest to apply its own law.<sup>182</sup> All states will be better off if they are occasionally willing to defer to each other's law.<sup>183</sup> This argument indeed supports a more multilateral approach to the conflict of laws, insofar as it relates to states;<sup>184</sup> but it would not apply as well to the relation between states and non-states. States, as the "community of nations," have a collective interest in maintaining their cartel of law-making and law administration and of not admitting outsiders into their cartel. Multilateralism, positive comity, reciprocal deference, all represent enlightened governmental interests of each state precisely because they empower states vis-à-vis non-states. It may not be a coincidence that globalization has spurred both more "positive comity" between governmental entities<sup>185</sup> and simultaneously attempts of the state to restrict the influence of individuals in litigation.<sup>186</sup> Multilateralism is indeed brought about by globalization; but it may be a reaction against, not an adoption of, globalization and legal pluralism. It may be the states' collective attempt to fight off the challenges from non-state communities.<sup>187</sup>

A similar point can be made regarding jurisprudence. It is possible to argue that non-communities must be allowed to convince states of their status as communities, just as foreign nations must somehow convince the state in which enforcement is sought that they are entitled to assert jurisdiction. Yet, the test applied in traditional U.S. conflict of laws suggests why non-state communities face a hard time succeeding in such jurisprudence. Normally, judgments from foreign nations are enforceable

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182. *Id.* at 1850-51. See ROBERT KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984) (stating a parallel argument from international relations); LEA BRILMAYER, *CONFLICT OF LAWS* 181-93 (2d ed. 1995) (adapting the international relations argument to choice of law).

183. Berman, *Cosmopolitan Vision*, *supra* note 5, at 1850-51.

184. See *id.* at 1821, *passim* (stating the main focus of Berman's article on a *Cosmopolitan Vision*); Perez, *supra* note 88 (stating that the assumption that people are members of various overlapping communities seems irrelevant for this claim).

185. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 30 (2003).

186. See, e.g., *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 170-71 (arguing for broader jurisdiction over governmental than over private actions).

187. Cf. Dane, *supra* note 120, at 985-86.

in U.S. courts, without relitigation of the merits; but they are not enforced if the foreign court did not have jurisdiction.<sup>188</sup> Whether the foreign court had jurisdiction is determined not only by its own law as a requirement for a valid judgment but also according to standards of the enforcing court. The decision of a foreign court will not be recognized and enforced unless a U.S. court, under similar circumstances, would have had jurisdiction as well. This means, for example, that foreign judgments based on exorbitant bases of jurisdiction, like the presence of assets unrelated to the litigation or the nationality of the plaintiff,<sup>189</sup> will not be recognized. The reason is not, however, that these bases are “exorbitant” by any universal standard—this would be neither necessary (because no such universal standard exists)<sup>190</sup> nor sufficient. Rather, the reason is that these bases are “exorbitant” as against the standard of the enforcing country. States accept the “jurispersuasion” of foreign countries only if their claim to jurisdiction is equivalent to the claims of the enforcing state.

This suggests why jurispersuasion works between states but not between states and non-state communities. Foreign states have at least a *prima facie* claim to enforcement because their jurisdiction is structurally similar to that of the enforcing state. Non-state communities, on the other hand, would not only have to argue that they are, as communities, entitled to assert jurisdiction in a sociological sense. In addition, they would have to argue that the jurisdiction they assert is, by nature, similar to the jurisdiction of courts in the enforcing state. Yet, since one criterion from the state’s perspective is that jurisdiction, as opposed to private ordering, exists only in the state, such an argument cannot succeed. The state accepts jurispersuasion, but it accepts it only from other states.

#### *D. Living Law and State Positivism in Choice of Law*

What is it about the state then that makes the recognition of non-state law as law so difficult? In order to answer this question, it may help to look

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188. *Hilton v. Guyot*, 159 U.S. 113 (1895).

189. See Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 M.E. L. REV. (forthcoming 2006) (providing a recent analysis and critique of exorbitant bases of jurisdiction in the United States and in France).

190. Negotiations towards a Worldwide Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, trying to ban certain jurisdictional bases worldwide, ended in the adoption of a Convention with a much reduced scope, focusing only on choice of court agreements. See Convention on Choice of Court Agreements, June 30, 2005, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98). But see Clermont & Palmer, *supra* note 189 (arguing that there is a common core of abhorred jurisdictional bases).

again to one of the founding fathers of legal pluralism, Eugen Ehrlich—the same Ehrlich who was influential for Teubner’s conception of legal pluralism. Shortly before publishing his treatise on legal sociology, at exactly the time he was developing ideas about the origin of law in society rather than in the state,<sup>191</sup> Ehrlich published an article, since forgotten, about conflict of laws.<sup>192</sup> In its second half, this article enthusiastically reviews Zitelmann’s treatise on private international law.<sup>193</sup> Its first half contains a history of private international law from antiquity to Ehrlich’s own time.<sup>194</sup> In the course of this history, Ehrlich accounts for tribal laws in Germanic times, when the applicable law was determined with reference to each individual’s tribal allegiance<sup>195</sup>—an early example of non-state jurisdiction and its relevance in the conflict of laws. For his own time, however, Ehrlich does not propose to expand conflict of laws to non-state communities because of “our modern conception, for which law is primarily an expression of the state’s will, and the judge an agent of the state”.<sup>196</sup>

This must of course affect private international law. Today, as a matter of course, only the state determines which law should apply in its boundaries. And the judge must no longer search for the law, which is enacted for the respective case; he must, as an agent of the state, apply the law that the state orders him to apply. If one speaks today of a national law, this is more and more not understood to

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191. Eugen Ehrlich, *Soziologie und Jurisprudenz* (1903), reprinted in *GESETZ UND LEBENDES RECHT. VERMISCHTE KLEINERE SCHRIFTEN* (Manfred Rehbinder ed., 1986); see Eugen Ehrlich, *Freie Rechtsfindung und freie Rechtswissenschaft* (1903), reprinted in 9 *MODERN LEGAL PHILOSOPHY SERIES* 70 (1917).

192. Eugen Ehrlich, *Internationales Privatrecht*, 126 *DEUTSCHE RUNDSCHAU* 419 (1906).

193. ERNST ZITELMANN, *INTERNATIONALES PRIVATRECHT* (1897). Zitelmann’s theory of private international law has recently been proposed as a model for conflict of laws in globalization, unfortunately without mention of Ehrlich’s article. See Thomas Decker, *Das Kollisionsrechtliche Werk Ernst Zitelmans (1852-1923)—Ein Konzept für die zukünftige Gestaltung des Internationalen Privatrechts?* (2004), available at [http://elib.ub.uni-osnabrueck.de/publications/diss/E-Diss381\\_thesis.pdf](http://elib.ub.uni-osnabrueck.de/publications/diss/E-Diss381_thesis.pdf). (last visited Oct. 15, 2005). Zitelmann and Ehrlich had both developed ideas of a world law; see Eugen Ehrlich, *Die Zukunft des Römischen Rechtsunterrichts in Österreich*, 6 *ÖSTERREICHISCHE RUNDSCHAU* 386 (1906); ERNST ZITELMANN, *ÜBER DIE MÖGLICHKEITEN EINES WELTRECHTS* 43 (1888/1916).

194. Ehrlich, *supra* note 192, at 419-28.

195. Simeon L. Guterman, *The Principle of the Personality of Law in the Early Middle Ages: A Chapter in the Evolution of Western Legal Institutions and Ideas*, 21 *U. MIAMI L. REV.* 259 (1966).

196. Ehrlich, *supra* note 192, at 425 (“Unsre moderne Vorstellung, für die das Recht vor allem ein Ausdruck des staatlichen Willens, des Richters ein staatlicher Besteller ist....”).

mean the law of *a people*, as a community held together by origin, language, history and culture, but the law of a *state*, as a governmental organization resting on a specific territory, which can either extend over a number of peoples, or only comprehend parts or particles of a people. And this state now orders that everyone and everything which is situated in its territory be subject to its law; only what it cannot reach with all its instruments of power eludes its law in fact<sup>197</sup>. . . . The question of private international law is now reduced to this: which law does the state order to apply in each individual case.<sup>198</sup>

The quote contrasts starkly with Ehrlich's own idea of a "living law."<sup>199</sup> Apparently, Ehrlich postulates the "living law" is born within communities only as a concept for legal sociology and as a source of inspiration for the legislator and the judge in domestic cases, not for private international law. Of course, one may argue that Ehrlich is only paying homage to the thinking of his time—once "living law" is recognized to be the law, he might argue for a change in the state's conflict of laws rules. Yet this is not so certain. Ehrlich makes clear that there is a connection between where conflict of law rules originate on the one hand and what counts as law on the other, between the designating and the designated normative system: "[W]hat matters for *today's* private international law are the concepts of law and state that govern *today*."<sup>200</sup> In other words, since the state has the

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197. Ehrlich, *Internationales Privatrecht*, *supra* note \_\_\_, at 425.

("Das muß selbstverständlich auch auf das internationale Privatrecht zurückwirken. Jetzt ist es selbstverständlich nur der Staat, der bestimmt, welches Recht in seinen Gemarkungen gelten solle. Und der Richter hat nicht mehr nach dem Rechte zu suchen, das für den in Betracht kommenden Fall gegeben ist; er hat, ein Beauftragter des Staates, das Recht anzuwenden, das der Staat ihm anzuwenden befiehlt. Wenn jetzt von einem nationalen Recht die Rede ist, so versteht man darunter immer mehr nicht das Recht eines Volks, als einer durch Abkunft, Sprache, Geschichte und Kultur verbundenen Gemeinschaft, sondern das Recht eines Staates, als einer auf einem bestimmten Gebiet ruhenden Herrschaftsorganisation, die sich sowohl über eine Mehrheit von Völkern erstrecken, als auch nur Teile oder Teilchen eines Volks umfassen kann. Und dieser Staat spricht es nun an, daß jeder und alles, was sich auf seinem Gebiete befindet, sich seinem Rechte unterwerfe; seinem Recht ist an sich nur das entzogen, worauf er mit all seinen Machtmitteln nicht greifen kann.").

198. *Id.* at 426 ("Die internationale privatrechtliche Frage löst sich also jetzt ganz in die Frage auf: welches Recht befiehlt der Staat in jedem einzelnen Falle anzuwenden").

199. See EHRlich, *supra* note 77 and accompanying text.

200. Ehrlich, *supra* note 192, at 431 ("Aber für das *heutige* internationale Privatrecht kommt es auf die Vorstellungen an, die *heute* über Staat und Recht herrschen. . ."), (emphasis in original). Cf. Dane, *supra* note 120, at 979.

monopoly over the creation of conflict of laws norms, it has the monopoly over the creation of substantive law norms and vice versa. The state uses its monopoly over choice of law rules to order the application of only state law because the state has the exclusive power to make laws—not in a sociological sense but in the understanding of the state that sets these rules.

What is so special about the state for conflict of laws? Is the state not just one among many types of communities? Is the state somehow more real than other associations? Does it have more legitimacy? In one way, the obvious answer is no. The state is an “imagined community” like other imagined communities.<sup>201</sup> There is nothing natural about the state. The state, at least in its modern form, is the fruit of a certain time; and it may decline again.<sup>202</sup> Proponents of legal pluralism have asserted this point in arguing against confining the status of law to state law. Once the state no longer serves as the formal criterion distinguishing law from non-law, no other criterion seems to do the job. If the state is not special, one might argue that neither is its normative order, state law. If we think of law as something not contingent on a specific kind of community, then there seems to be no reason to bind it to the state.

In another way, however, the answer is not so easy. First, it is not enough to grant that the state, as its own imagined community, is actually as real as other communities.<sup>203</sup> Once we move from actual hard facts or external observations to imagination, we cannot stop arbitrarily at the thin criterion of “community” that states and non-states share. Imagination not only creates both states and non-states as communities, it also creates the special role that the state adopts amongst all these various communities. As Justin Rosenberg puts it, “[T]he apparent correspondence of ideas of empty space and time to the properties of a pre-social natural universe does not change the fact that those ideas too are ‘full’ of social and cultural determinations.”<sup>204</sup> In this sense, the exclusivity of the state as the only relevant community is likewise real, even if only as “imagined,” as a social construct.<sup>205</sup> This means not only that the state “is still a particularly

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201. Berman, *Globalization of Jurisdiction*, *supra* note 5, at 320, 462-72 (citing BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1991)).

202. MARTIN VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* (1999); WOLFGANG REINHARD, *GESCHICHTE DER STAATSGEWALT: EINE VERGLEICHENDE VERFASSUNGSGESCHICHTE EUROPAS VON DEN ANFÄNGEN BIS ZUR GEGENWART* 15 (1999).

203. Berman, *Globalization of Jurisdiction*, *supra* note 5, at 496.

204. JUSTIN ROSENBERG, *THE FOLLIES OF GLOBALISATION THEORY: POLEMICAL ESSAYS* 6 (2000).

205. SANTOS, *supra* note 7, at 438 (“In a polycentric legal world, the centrality of the state law, though increasingly shaken, is still a decisive political factor. But above all, it is

powerful imagined community and one that generates real feelings of loyalty and attachment,"<sup>206</sup> but that people frequently imagine it as the only community entitled to make law. Once one looks not at objective criteria for the definition of the state but rather at people's perceptions, then that perception that the state has a special role among the various imagined communities becomes relevant for our assessment of its status.

In this context, it is again important to see that recognizing the law-making power of other states does not weaken the state's position but strengthens it. The mutual recognition of states and the mutual enforcement of each other's laws enable states to stand more steadfastly above individual parties and non-state communities. Through conflict of laws, states mutually constitute each other as law-makers. The relation between the state and non-state communities is necessarily different. It is not a relation of mutual delimitation of spaces to engage in structurally similar activities like legislation, enforcement, or adjudication, but a delimitation of public and private spaces respectively. It is not a relation of segmentary differentiation, as that between states, but one of functional differentiation between the public and the private sphere. While state and society mutually constitute each other, they constitute each other as state and society respectively, not as lawmakers.

A state's obligation to recognize non-state law as law would therefore have to come from a reference system external to the state, from a universalistic position. Indeed, Berman, at times, seems to adopt such a position when he considers a natural law of jurisdiction,<sup>207</sup> arguing that "we could adopt a choice-of-law rule that takes the perspective not of an individual state but of the entire global legal system, and then try to resolve the choice-of-law question,"<sup>208</sup> and posits that not all governmental interests may be legitimate from Currie's perspective of governmental interest analysis.<sup>209</sup> Similarly, Fischer-Lescano and Teubner, in postulating "a form of conflicts law that is not based on the determination of one territorial law which has the closest relation to the conflict, but which seeks instead to identify the functional regime to which the legal issue in question belongs,"<sup>210</sup> appears to take such a universalistic position.

Leaving aside for a moment the question of whether such a

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reproduced by multiple mechanisms of acculturation and socialization."); Dane, *supra* note 120, at 963 ("Modern States are not like other communities. No amount of talk will change that.").

206. Berman, *Globalization of Jurisdiction*, *supra* note 5, at 496.

207. *Id.* at 493 (citing Cover, *Nomos and Narrative*, *supra* note 92, at 58).

208. Berman, *Cosmopolitan Vision*, *supra* note 5, at 1851.

209. *Id.* at 1852.

210. Teubner & Fischer-Lescano, *supra* note 5, at 1021.



universalistic position would be desirable, the state, from its perspective, will likely reject both claims. Since it has overcome its grounding in international law, the perspective of conflict of laws is the perspective of an individual state, not that of the entire global legal system or even the entire world society. And from the state's perspective, every interest that a state has is by definition a legitimate from a governmental interest analysis because the state has no other standard of legitimacy. Even Anne-Marie Slaughter, otherwise a strong proponent of cosmopolitanism, admits that "it is still a leap, however, from the point that U.S. government representatives, in every branch, must take account of international events, trends, and interests to represent their constituents adequately to the argument that they should also see themselves as representing a larger transnational or even global constituency."<sup>211</sup> From a global perspective, one may see a sociological "conflict" of laws that has the characteristics Fischer-Lescano and Teubner ascribe to it. From the perspective of the state as master over conflict of laws norms, this is not the case.

All of this suggests that states could in theory accept non-state law as "law" through a conflict of laws process, but that there are political reasons why they likely will not. By their very nature, states likely will continue what they do now: incorporate, defer to, or delegate normative orders, but not accept them as law. This may seem narrow-minded or blind. Yet this blindness is the consequence of the blind spot in the conception of the state. The state maintains its ability to decide conflicts between diverging factions only insofar as it can transcend these factions, as it ignores different communities' claims for normative authority and reduces their jurisdictional claims to mere positions of parties before the law. If the state treated all communities as its equals, it could no longer assume this transcendent position. Just as states cannot sit in judgment over other states in international law, such states could no longer sit in judgment over disputes between non-state communities. When all positions become communities,<sup>212</sup> all substantive law turns completely into conflict of laws. Legal pluralism would lead to the end of substantive law as we know it.<sup>213</sup>

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211. SLAUGHTER, *supra* note 185, at 233-34. Slaughter justifies the leap with the suggestion that it is necessary "to avoid global government." *Id.* at 234. But world government and cosmopolitanism are hardly the two only possible developments.

212. For an extreme example, see Melissaris, *supra* note 92, at 75 ("Only when the legal commitment of clubbers who queue patiently at a bouncer's orders is treated as seriously as the legal commitment of communities with religious or other moral bonds will the pluralistic study of the law be able to move away from the essentially positivistic external study of groups to the study of legal discourses").

213. *Cf.* Dane, *supra* note 120, at 991 ("An unlimited account of non-state sovereignty might require the state to dissolve.").

## V. PLURALIZATION OF THE STATE

This quite elaborate argument demonstrates why the state does not normally recognize non-state normative orders as law. The state cannot recognize non-state law as law and at the same time maintain the same concept of itself. The normative order designated by the choice of law rules is always, it turns out, a reflection of the normative order encompassing the choice of law rules. The laws of foreign states may be applied as law because these laws are structurally similar to the state's own laws for states are structurally similar. Other normative orders cannot be so applied without a reconceptualization of the state itself.

States may have no interest in such a development. Yet the state is only a social construct; the interests assigned to it are only metaphorical. The real normative question is not, of course, what the state wants, but what the world community wants. The answer requires a move away from a descriptive to a prospective perspective: What would happen if the state accepted the challenge from pluralism?

*A. The Proliferation of Conflicts*

A first consequence would be the proliferation of conflicts of laws.<sup>214</sup> Legal pluralism leads not only to bilateral conflicts between state law and non-state law but also to conflicts between different non-state orders. A pluralist concept of conflict of laws will therefore lead to more conflicts. Take the famous example of the cases generated when Yahoo users offered Nazi paraphernalia on Yahoo's auction site. A French court ordered Yahoo to make offers unavailable to users in France, and a California district court declared the judgment unenforceable in California.<sup>215</sup> Berman convincingly

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214. On conflicts between non-official laws as an underappreciated phenomenon of legal pluralism, see Masaji Chiba, *Other Phases of Legal Pluralism in the Contemporary World*, 11 *RATIO JURIS* 228, 229, 230, 234-38 (1998).

215. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22 & Nov. 20, 2000; *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*, 169 F. Supp.2d 1181 (N.D. Cal. 2001), *rev'd on other grounds*, 379 F.3d 1120, 1132 (9th Cir. 2004), *reh'g en banc granted*, 399 F.3d 1010 (9th Cir. 2005); *rev'd* 433 F.3d 1199 (9th Cir. 2006).

An irony of this now famous case is that the substantive decision in France, namely that a web site provider could be liable for the Nazi paraphernalia offered on its site, may well be moot. In April 2005, the Cour d'appel de Paris upheld an earlier decision, acquitting Yahoo's former president of essentially the same charges that were brought against Yahoo!, because the provider of an auction site could not violate the relevant Article of the French Criminal Code. *Association d'Anciens Déportés d'Auschwitz et Mouvement Contre Le Racisme et L'Antisémitisme v. Google* (Cour d'appel, Paris), 10 *ELECTRONIC COMMERCE*

regards the French assertion of jurisdiction as justifiable and suggests strong reasons for a U.S. court to recognize the French decision.<sup>216</sup> If Americans criticize the French assertion of jurisdiction as extraterritorial, they forget that denying the French jurisdiction leads to a similarly extraterritorial application, in this case extraterritorial application of the First Amendment of the U.S. Constitution.<sup>217</sup> Yet the recognition of an existing conflict does little to solve it. Worse, legal pluralism makes the problem even bigger because now the conflict is not only one between the French and the American or Californian community. Numerous other overlapping communities are involved as well: the community of bidders in internet auctions, the community of survivors of the Holocaust, the community of opponents of Holocaust denial, the community of free speech advocates, the community of collectors of Nazi paraphernalia, etc. All these communities have a *prima facie* claim to asserting jurisdiction over the Yahoo case, and the norms they would wish to be applied are hardly all the same.

The chance for conflict between communities is greater than between states for another reason. States are all relatively heterogeneous internally. They formulate their policies, at least in democracies, through some process of internal interest balancing. This tends to lead to large degree of similarity between the laws of different states. Non-state communities, on the other hand, will often be relatively homogeneous internally. This homogeneity provides a good argument to leave the regulation of their own internal affairs to themselves—something the state can do through deference and delegation. However, insofar as conflicts between communities are at stake, the claim of communities to “jurisdiction” is not different from the formulated policy of a business association; and their efforts at “persuasion” do not differ from political lobbying by interest groups.<sup>218</sup> The need for each state to mediate “internal” conflicts in the creation of its norms reduces the

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AND LAW REPORT 384 (2005). Had Yahoo! appealed the decision in France, instead of going right to the Californian courts, it might well have reached an acquittal as well.

216. Berman, *Cosmopolitan Vision*, *supra* note 5, at 1878; *but see* Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PENN. L. REV. 1951, 1959 (2005).

217. Ralf Michaels, *Territorial Jurisdiction after Territoriality*, in GLOBALISATION AND JURISDICTION 105, 118 (Piet Jan Slot & Mielle Bulterman eds., 2004); Berman, *Cosmopolitan Vision*, *supra* note 5, at 1836, 1877. Some authors argue that U.S. law should prevail because the First Amendment, as Constitutional law, is superior to a mere French statute. *See* Ayelet Ben-Ezer & Ariel L. Bendor, *Conceptualizing Yahoo! v. L.C.R.A.: Private Law, Constitutional Review, and International Conflict of Laws*, 25 CARDOZO L. REV. 2089, 2135-36 (2004). However, such a transnational hierarchy does not exist. The U.S. Constitution is superior *qua* Constitution only to U.S. statutory law, and French statutory law is inferior *qua* statutory law only to the French Constitution.

218. Of course, foreign nations also engage in lobbying. The difference is that lobbying is not the only path available for foreign nations.

number of conflicts between the norms of different states. Non-state communities have fewer such needs and will therefore diverge more frequently from others.

*B. The Violence of Conflicts*

Thus, the more lawmakers there are, the more conflicts will arise. Ironically, this makes the position of the state as decision maker more crucial. Does legal pluralism at least lead to more peaceful resolutions of such conflicts, because the recognition of other lawmaking communities forces greater deference to their decisions? Proponents of legal pluralism often support pluralism as a peaceful alternative to the violence of the state.<sup>219</sup> This idea is obviously influenced by the colonial origins of the concept of legal pluralism—the encounter of a repressive Western legal system and a repressed local law mediated by pluralism.<sup>220</sup> Pluralism, in avoiding repressions, seems more peaceful. Yet in globalization, this hope may well be turned on its head.

One somewhat counterintuitive illustration of this is the war on terror. What does it have to do with conflict of laws?<sup>221</sup> The U.S. administration continually justifies its actions in legal terms, continually emphasizing its *right* to self-defense, the *legality* of its actions.<sup>222</sup> If the U.S. asserts a right to go to war against Afghanistan and Iraq without express authorization by an international law institution (the U.N. Security Council or the International Court of Justice), this presumes the assertion of jurisdiction to determine the existence of such rights. In fact, the statement can be reconceptualized from a conflict of laws perspective. First the U.S. asserts jurisdiction to determine the existence of a right to preemptive self-defense. The basis may well be the effects of terrorism on the U.S., effects being one generally accepted basis for jurisdiction.<sup>223</sup> Then, in a choice-of-law analysis, the U.S. determines an unspecified body of quasi-natural law granting such a right in opposition to traditional public international law to be applicable.<sup>224</sup> Finally, the U.S. enforces its own decision with military

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219. MARY KALDOR, *GLOBAL CIVIL SOCIETY: AN ANSWER TO WAR* (2003).

220. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

221. Diane Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2104-06, 2115-16 (2005).

222. Michael Byers, *Preemptive Self-defense: Hegemony, Equality and Strategies of Legal Change*, 11 J. OF POL. PHI. 171 (2003); Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613 (2005).

223. Another possible basis is the protective principle. See Vaughan Lowe, *Jurisdiction*, in *INTERNATIONAL LAW* 329, 342 (Malcolm D. Evans ed., 2003).

224. The International Court of Justice has, in a lengthy obiter dictum, rejected the U.S.

power.<sup>225</sup> Of course, in the case of Iraq, the U.S., unlike non-state communities, does not require jurisprudence in order to convince other states to enforce its jurisdiction. It can do so on its own.

All of this may be considered appropriate or inappropriate; and legal pluralism will not help in the assessment because, as an analytical concept, it has no inherent normative value.<sup>226</sup> Yet it must not be forgotten that, from a pluralist perspective, the United States is not the only community asserting jurisdiction in this war. Saddam Hussein's insistence on the sovereignty of Iraq—in itself an insistence on jurisdiction to determine what is best for Iraq—had to be disregarded in the course of the war, whether rightly or wrongly. Worse, terrorist groups in Iraq similarly assert their power over Western captives in ways that could be seen as law-like. They assert “jurisdiction” based on these Westerners’ presence in Iraq as members of, or at least in connection with, the occupying forces, or based on their nationality. They then convict them and enforce their “judgments” in the manner they see fit: a video-taped beheading. Should we grant these terrorist groups the *prima facie* status of a community with its own jurisdiction? Berman acknowledges that “some communities may embrace norms that many would find undesirable”<sup>227</sup> but does not find a great problem because “in order for the legal norms of a non-state community to be enforced, such norms must be adopted by those with coercive power and abhorrent assertions of jurisdiction are unlikely to achieve widespread acceptance.”<sup>228</sup> This is of little help where these communities enforce their decisions on their own. More importantly, from the perspective of theory, it is not clear whether the issue is jurisdiction at all. What exactly is abhorrent here—the assertion of jurisdiction by these communities or the outcome of the assertion? Do we deny these groups the right to make and administer law altogether, or do we deny recognition only to the results of its exercise? Is our rejection of their decisions based on their lack of jurisdiction, or merely on a public policy exception? Since terrorist groups

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claim to a right of preemptive self-defense, as invoked for the Iraq war. Case Concerning Oil Platforms (Islamic Republic of Iran v. United States), Judgment, 2003 I.C.J. Reports, paras 37-78 (Nov. 6). For possible justifications for the Afghanistan war, see Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 INT’L & COMP. L.Q. 401 (2002).

225. See Goldsmith, *supra* note 34, at 1216 n. 74 (citing *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) (discussing military invasion as a method of extraterritorial enforcement)).

226. Woodman, *supra* note 68, at 48; SANTOS, *supra* note 7, at 90; Koskeniemi, *supra* note 84, at 16-17.

227. Berman, *Globalization of Jurisdiction*, *supra* note 5, at 511.

228. *Id.*; Berman, *Law and Globalization*, *supra* note 5, at 538.

are undoubtedly communities, it seems that cosmopolitans would have to go the latter way.<sup>229</sup> It is doubtful whether a theory that must put so much emphasis on the public policy exception is more apt to deal with the challenges of legal pluralism than traditional conflict of laws. Many of the non-state legal orders embraced (necessarily) by legal pluralism are deeply unjust. Little seems to be gained if courts recognize their jurisdiction only to deny recognition to the results of their asserting that jurisdiction.

This glance at abhorred non-state communities opens the view to another, perhaps unwelcome, consequence of cosmopolitan conflict of laws. Raising non-state communities to the level of the state as law-making bodies necessarily implies reducing the state to the same level as non-state communities. If the jurisdiction of non-state communities can be recognized when they succeed in jurisprudence, it seems plausible that states may deny jurisdiction for states that fail in jurisprudence. So far, the *prima facie* jurisdiction of states is recognized, regardless of whether they are democratic or not. But why, in a cosmopolitan pluralist conception, should we do this? Why should we not deny states with non-representative governments their jurisdiction? We occasionally disregard their sovereignty in the new world order;<sup>230</sup> should we not likewise simply disregard, for purposes of conflict of laws, their right to make and administer law altogether? Or is it not rather liberating for small and weak states that they need not constantly engage in jurisprudence because their decisions are *prima facie* granted recognition?

### C. From Law to Power

From this view, a pluralist vision of conflict of laws may have exactly the opposite effect from its ideal. Pluralism cannot avoid making a distinction between communities with and communities without jurisdiction, which in traditional conflict of laws is achieved through the formal criterion of the "state." It cannot protect non-state communities (and arguably weak states) from having to convince powerful states of their jurisdiction, so that their law will be enforced. Nor can it achieve a universal criterion binding on states that will tell them in what situations

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229. Berman does not distinguish both grounds of rejection. Berman, *Globalization of Jurisdiction*, *supra* note 5, at 511, 525-26 ("[A] cosmopolitan pluralist approach requires that the enforcing court scrutinize the original judgment both for its assertion of community dominion and for its substantive norms."); Berman, *Law and Globalization*, *supra* note 5, at 539.

230. See, e.g., Karime Bennoune, "Sovereignty vs. Suffering"? *Re-examining Sovereignty and Human Rights through the Lens of Iraq*, 13 EUR. J. INT'L L. 243 (2002).

they must recognize the jurisdiction of foreign communities, and when they need not. This leaves jurisprudence as the only relevant criterion. We can hope that this will lead to more deliberation, but we must fear that it will lead to an enhanced role for power and the selfish interest of communities.

The danger is that these matters rest in the hands of powerful actors, be they states or other communities. It is the conflict of laws of powerful states that determines who is in the club and who is not. For these states, conflict of laws can become a tool of hegemony. For weaker states and non-state communities alike, the need of jurisprudence necessitates acceptance of such power. The apotheosis of legal pluralism collapses back into crude international relations realism in which each community determines what is best for itself; and the strong states are not seriously constrained in asserting their own jurisdiction, denying that of other communities, whenever they want. When every community can, *prima facie*, equally claim jurisdiction, jurisdiction no longer fulfills a filtering, distinguishing function. Questions of conflict of laws become mere questions of politics and power. The traditional concept of choice of law, with all its shortcomings and inadequacies, has been able to function as a “gentle civilizer of nations.”<sup>231</sup> Whether the impact of a new choice of law based on global legal pluralism will be more civilizing or less seems doubtful.

#### *D. The Politics of Conflict of Laws*

Compared to this, the traditional approach to conflict of laws, which designates only state law to be the applicable law, suddenly looks attractive again, both politically and rhetorically. If we cannot maintain this approach in good faith because we realize that the monopolistic position of the state has become untenable under conditions of globalization, then we need a political theory to support the new choice of law. We will have to ask whether the freedom that the law sets out to guarantee can be had without the state.<sup>232</sup> We will have to ask whether there can be a meaningful system of global governance that collapses neither into structures of empire or a

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231. Cf. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2001).

232. See, e.g., William E. Scheuerman, *Cosmopolitan Democracy and the Rule of Law*, 15 *RATIO JURIS* 439 (2002); Pierre Manent, *Democracy Without Nations?*, *JOURNAL OF DEMOCRACY* (April 1997); Marc F. Plattner, *Sovereignty and Democracy*, 122 *POLICY REVIEW* 3 (Dec. 2003 - Jan. 2004); Jürgen Habermas, *The Postnational Constellation and the Future of Democracy*, in JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION* 58 (Max Pensky, ed. & trans., 2001); JEREMY A. RABKIN, *LAW WITHOUT NATIONS?: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* (2005); ALFRED C. AMAN JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004).

global state<sup>233</sup> nor into an anarchical system in which, because all alleged or real communities are formally equal, pure power rules. Overcoming the regulatory state is a goal both of the radical left (e.g. Marxism), and the radical right (e.g. libertarianism). If pluralist conflict of laws as a normative proposal wants to steer a middle way, it will need a robust political theory of global governance to back it up.

Developing such a theory would be one way forward. Another use of insights from legal pluralism would be to abandon the claim that non-state normative orders are law like state law while maintaining the call for their recognition. Even in the debate within legal anthropology and sociology, there is no agreement as to whether non-state legal orders must be seen and treated as “law.” For example, Simon Roberts has recently voiced a warning against “representing law without the state.”<sup>234</sup> Others have been similarly cautious about calling non-official law “law.”<sup>235</sup> These authors are quite unsuspicious of trying to preserve some kind of unjustified primacy of the state over non-state actors. Rather, they fear that an extensive concept of law is not helpful methodologically, both for the law and for anthropology. As to the first claim, Roberts points out that “as radically different modes of ordering and decision are represented together as ‘legal,’ law loses analytic purchase.”<sup>236</sup> As to the second claim, “negotiated orders have their own rationalities.”<sup>237</sup>

Often, there is an ideological reason for the desire to raise non-state law to the level of law, both on the left and on the right. On the left, proponents point out that referring to non-state normative orders as something other than law strips these orders of positive characteristics associated with the term “law.”<sup>238</sup> On the right, proponents of *lex mercatoria* are frequently also proponents of free markets. For them, denying the state the monopoly over law-making equates with denying the state its superior role in determining adequate levels of regulation. Similarly, the invocation of an autonomous law of the internet came hand in hand with a normative claim against regulation and was rejected in no large part for this normative claim. The use of terminology like “law” subtly suggests greater autonomy of normative orders. This is why Richard Ford is so critical of such

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233. MARTIN SHAW, *THEORY OF THE GLOBAL STATE: GLOBALITY AS UNFINISHED REVOLUTION* (2000); MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2000).

234. Simon Roberts, *After Government? On Representing Law Without the State*, 68 MOD. L. REV. 1 (2005).

235. Tamanaha, *supra* note 109, at 192. For a defense of legal pluralism against Tamanaha and especially Roberts, see von Benda-Beckmann, *supra* note 68, at 37-59.

236. Roberts, *supra* note 234, at 23; cf. Merry, *supra* note 75, at 878.

237. Merry, *supra* note 75, at 878. Roberts, *supra* note 234, at 23.

238. Weyrauch & Bell, *supra* note 28, at 369.



“spatialization” of the internet: “Metaphysics of space threatens to derail sound analysis and to smuggle in, as inevitable or logically compelled, background rules that should be subject to debate,”<sup>239</sup> including self-regulation. The new *lex mercatoria*, in its attempt to escape state regulation, has been criticized from a political perspective.<sup>240</sup> On the left, legal pluralists oppose the nationalism and ethnocentrism instilled in classical conceptions of law. By limiting the notion of law to state law, legal pluralists argue, we implant an intrinsic bias into our analyses, a bias for the state, which in turn is a Western concept. Yet it may evidence an even stronger bias to represent non-state legal orders as law. Doing so may well conceal that the non-state communities want their normative orders to be different from the law as it is known in the Western state. As long as our concept of law is implicitly based on a Western state paradigm, transposing this concept to non-state communities will not overcome the centrality of the state, but rather will perpetuate it. The power of non-state norms may lie in their otherness, in their character as non-law. This power is easily reduced, these non-state orders are domesticated, once we reconceptualize these norms as law.

Thus, it may well be that critics fighting state-centrism and ethnocentrism fall into an equally dangerous position: juricentrism. For example, the new *lex mercatoria* was a product of international arbitration, which presented itself as an alternative to, rather than a replication of, the law. Arbitration was attractive precisely because the equitable rules arbitrators applied were not the same as those applied by courts. In this sense, raising non-state normative orders to the level of law may not meet the interest of those who created those orders. “Law,” Roberts writes, “long so garrulous about itself, is now, in its contemporary enlargement, graciously embracing others in its discourse, seeking to tell those others what *they* are.”<sup>241</sup> We can link this back to the politics of recognition. If the recognizing state, in order to recognize non-state normative orders as law, must define them from the outside; if communities, in order to have their

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239. Ford, *supra* note 43, at 177.

240. Brigitta Lurger, *Der Pluralismus der “lex mercatoria,”* 16 RECHTSHISTORISCHES JOURNAL 705 (1997) (criticizing Teubner’s “global Bukowina”); CUTLER, *supra* note 55; YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER, 311-17 (1996). For a partial response, see Teubner, *Breaking Frames*, *supra* note 21, at 158-59; Karl-Heinz Ladeur, *Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 89 (Karl-Heinz Ladeur ed., 2004).

241. Simon Roberts, *Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain*, 42 J. OF LEG. PLURALISM 95, 98 (1998).

normative orders recognized, must show them to be equivalent to the state's law, then recognition, "as law," becomes the opposite of recognition—it becomes a "violent appropriation."<sup>242</sup>

## V. CONCLUSION

Legal pluralism, does not translate into conflict of laws as easily as we may think or wish. From the detached position of the sociologist and the anthropologist, state and non-state orders may look similar. From the position of the state that must distinguish for normative purposes between law and non-law, this distinction becomes crucial because its abolition would ultimately undermine the state itself. The same is true for the position of non-state communities, which would undermine their own character as non-states if the distinction was abolished.

This leaves us with a dilemma. We cannot go back to the illusion that the state is the only relevant creator of norms in the world and so continue choice of law as before. At the same time, the challenge of legal pluralism for choice of law has far more dramatic implications than one might have thought. A change in the nature of "applicable law" under choice of law rules goes hand-in-hand with a simultaneous change in the nature of not only the non-state communities whose "law" should be applied, but also the state whose choice of law rules designate the applicable law. In their desire to counter the centrality of the state and to acknowledge the existence of non-state legal orders, legal pluralists make us see more clearly the centrality of the state for our thinking about law and choice of law. Conflict of laws cannot solve the challenge from legal pluralism without also questioning the role and nature of law.

Traditionally, the state is the blind spot of choice of law. Legal pluralism succeeds in forcing us to focus on this blind spot and to turn its central and monopolistic position from an unquestioned axiom to a contingent observation in need of legitimation. Yet legal pluralists err if they assume that our merely realizing the contingency of the state's position permits us to dispense with it. The world of conflict of laws is still based strictly on the state to the extent that the state administers conflict of laws. It follows that we should turn the questions asked by legal pluralists from their heads to their feet. Instead of asking how globalization has changed the role of the state in the world, we must ask how the state must change itself in order to deal with globalization. Instead of asking how multiple communities can replace or supplement the state, we must ask how the state

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242. See Majid Yar, *Recognition and the Politics of Human(e) Desire*, 18 THEORY, CULTURE & SOCIETY 57 (2001).

can accommodate multiple communities. Instead of asking how conflicts can be avoided through privatization and depoliticization of private law, we must ask how conflicts be resolved through a combination of public and private interests.<sup>243</sup> In short, instead of moving the state to the periphery of our analyses and thereby denying its importance for our problems, we must move it into the analytical center of our analysis so as to be able to critique its role in globalization. To emancipate non-state law vis-à-vis the state, it is not enough to change the status of non-state law within the state. We must look as well at what is necessary on the side of the state to make such emancipation possible; and we must ask what kind of emancipation this will be.

The idea that since globalization brings about a plurality of legal orders the state should recognize all these orders as law is either too radical or not radical enough. It is too radical if it expects the state to do things that run counter to what the state, as it exists right now, is about. The state will always react as a state to the challenges of globalization, including challenges from non-state communities and their laws. The idea is not radical enough if it includes the belief that such a change could be brought about without changing the character of the state. In order to overcome the state-centered focus of conflict of laws, the state itself must be overcome. Ultimately, acknowledging the *prima facie* jurisdiction of everyone to make law goes hand-in-hand with acknowledging that no one has the unquestioned jurisdiction to make law anymore.<sup>244</sup> If everyone is able to claim jurisdiction, no one will have a superior position to mediate between the norms conflicting of conflicting communities anymore, at least not from a superior basis. Whether this is a desirable postmodern situation is not for this article to answer. In any event, it is a far more radical consequence than what a mere adaptation of conflict of laws norms to globalization would otherwise suggest.

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243. See Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L. L. 209 (2002); Horatia M. Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, 9 COLUM. J. EUR. L. 393 (2003).

244. Cf. Dane, *supra* note 120, at 992 ("If every social order that the state confronts is a legal order, there is not legal order. If every legal thought is law, there is no law.").